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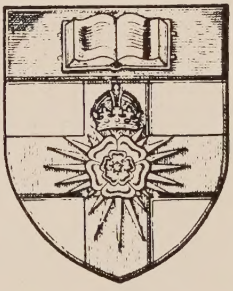

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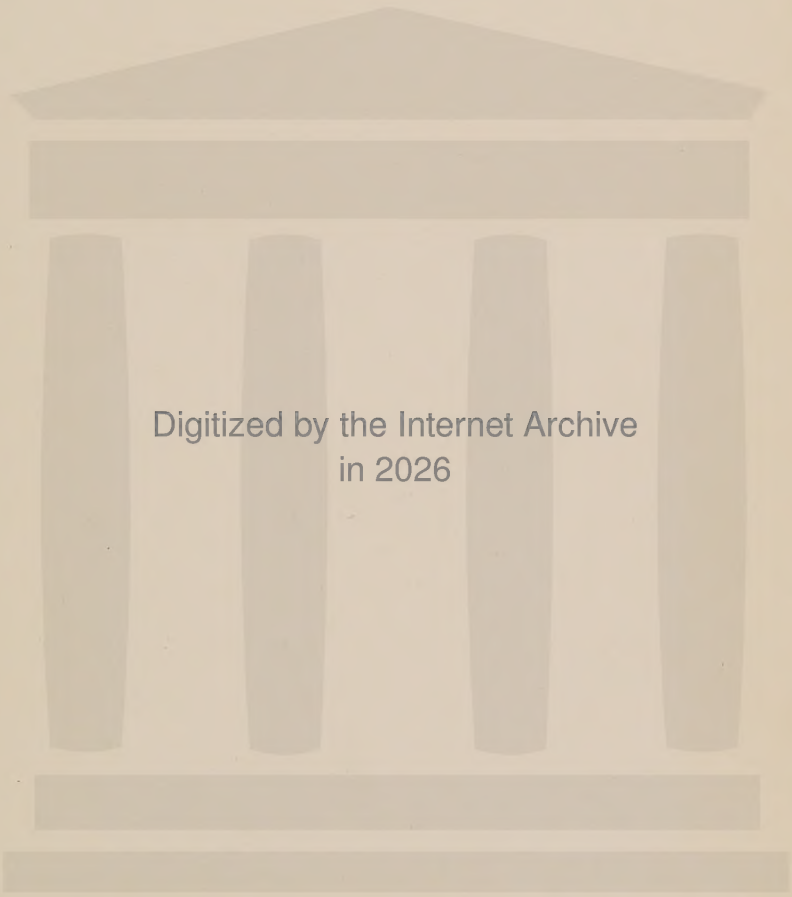
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1908

Jan. 18. Sir John Lawson Walton, *His Majesty's Attorney-General, died at his residence, Great Cumberland Place, London, in his 56th year.*

Jan. 30. Sir William Snowdon Robson, K.C., *His Majesty's Solicitor-General, was appointed His Majesty's Attorney-General in succession to the late* Sir John Lawson Walton, *and* Samuel Thomas Evans, K.C., *was appointed Solicitor-General in succession to* Sir William Snowdon Robson. *He was afterwards knighted.*

Nov. 9. Sir James Charles Mathew, *formerly a Lord Justice of the Court of Appeal, died at his residence in Queen's Gate Gardens, Kensington, at the age of* 78.

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

H. L. (E.) 1907

Nov. 20.

GUARDIANS OF THE POOR OF WEST HAM UNION . . . . . } APPELLANTS;

AND

GUARDIANS OF THE POOR OF EDMONTON UNION. . . . . } RESPONDENTS.

Settlement—Pauper—Parish, Division of—Destruction of Settlement—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61)—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73).

A pauper, who has acquired a settlement in a parish which is afterwards divided into more than one parish, does not lose his settlement by the division.

Reg. v. *Tipton*, (1842) 3 Q. B. 215, and the other cases which followed that one, overruled as to the above point.

THE facts material to this appeal are stated in the judgment of Lord Loreburn L.C. The King's Bench Division and the Court of Appeal followed *Dorking Union* v. *St. Saviour's Union* (1) and

(1) [1898] 1 Q. B. 594.

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the other cases founded upon *Reg.* v. *Tipton*. (1) Hence this appeal.

Oct. 29, 30. *Avory*, *K.C.*, and *Daldy*, for the appellants. This is virtually an appeal from *Dorking Union* v. *St. Saviour's Union* (2), where the Court of Appeal followed *Reg.* v. *Tipton* (1), in which it was held that the division of a parish destroyed its identity, and that a settlement gained in a part of the parish which is subsequently constituted into another parish or township vanished. Cockburn C.J. and Blackburn J. in *Stourbridge Union* v. *Droitwich Union* (3) disapproved, but felt constrained to follow, *Reg.* v. *Tipton* (1); and Lord Halsbury, citing them in *West Ham Union* v. *London County Council* (4), treated the question as still open to the consideration of this House. In the *Dorking Case* (2) itself Lindley M.R. said that *Reg.* v. *Tipton* (1) "put a very narrow construction upon 13 & 14 Car. 2, c. 12." Sect. 21 of that Act provides "that all and every the poor &c. . . . . within every township or village shall . . . . be maintained, kept, provided for and set on work within the several and respective township and village wherein he, she, or they shall inhabit or wherein he, she, or they was or were last lawfully settled." This Act was the first removal statute. It is to be observed that the Act was not confined to cases of settlement in a parish—the words are "township or village"; and the authorities would, on the natural construction of the words, be those which from time to time governed the township or village for poor law purposes. It was an illegitimate inference in that and the later cases that there was no settlement except in a parish. In former times the parish was the unit which found the money; now it is the union. It makes no difference that in the *Tipton Case* (1) the change was made by order whereas here it was made under statute—the Local Government Act, 1894. Of the older authorities *Rex* v. *Saighton-on-the-Hill* (5) was a case of the last legal settlement. A pauper was settled in A., and subsequently acquired a settlement in B., which afterwards ceased to exist for

(1) 3 Q. B. 215.
(2) [1898] 1 Q. B. 594.
(3) (1871) L. R. 6 Q. B. 769, 774.
(4) [1904] A. C. 40.
(5) (1818) 2 B. & Ald. 162.

poor law purposes, and it was held that the pauper could not be sent back to A. In *Rex* v. *Oakmere Inhabitants* (1) it was decided that an enactment bringing an extra parochial place into a parish was not retrospective. *Rex* v. *Oldbury* (2) was a case of estoppel; *Reg.* v. *Hunnington Inhabitants* (3) followed *Reg.* v. *Tipton.* (4) In *Reg.* v. *St. Martin, New Sarum* (5), where by a private Act two parishes were united, a settlement gained in one was held to be continued in the newly constituted parishes. That case and *West Ham Union* v. *London County Council* (6), in which it was held that a parish which has enlarged its borders does not lose its identity, are in favour of the appellants.

Macmorran, K.C., and *Bethune*, for the respondents. A settlement can only be acquired in a parish, and according to *Reg.* v. *Tipton* (4), which has been followed for more than sixty years, it must be in the parish as a whole, and not in any particular part of it, so that on division of the original parish there is no settlement. In the *Dorking Case* (7) Rigby L.J. said, in reference to *Reg.* v. *Tipton* (4), that the destruction of settlements was "very possibly not an unintentional result of the legislation"; and Vaughan Williams L.J. entirely agreed with the reasoning of *Reg.* v. *Tipton.* (4) The pauper lunatic did not acquire a settlement in the parish of Wood Green, though he had one in the ancient parish of Tottenham, which has ceased to exist, and his father did not reside in the parish of Wood Green, which had not been constituted. In *West Ham Union* v. *London County Council* (6) this House expressly abstained from the expression of any opinion on *Reg.* v. *Tipton.* (4) Many orders have been made under the Local Government Acts of 1888 and 1894 on the assumption that the principle of *Reg.* v. *Tipton* (4) is law, and after more than sixty years it is now too late to disturb that decision. In *Rex* v. *Middlesex Justices* (8) a clause was inserted in the order which provided that the division of a parish should not have the effect of destroying settlements already acquired therein.

The House took time for consideration.

(1) (1822) 5 B. & Ald. 775.
(2) (1835) 4 Ad. & E. 167.
(3) (1843) 5 Q. B. 273.
(4) 3 Q. B. 215.
(5) (1846) 9 Q. B. 241.
(6) [1904] A. C. 40.
(7) [1898] 1 Q. B. 594.
(8) [1907] 2 K. B. 581.

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Nov. 20. LORD LOREBURN L.C. My Lords, the material facts of this case are as follows: One Forrest, a pauper, acquired, either by birth or residence, a settlement in Tottenham parish, which at that time was one parish, though divided for public health purposes into two districts, namely, Wood Green and Tottenham. Subsequently, by the operation of the Local Government Act, 1894, the parish of Tottenham came to be divided into two parishes corresponding with the two districts already mentioned. And so thenceforth there were two parishes for poor law purposes where there had been but one, namely, the parish of Wood Green and the parish of Tottenham. Now Wood Green was the place where Forrest was born or resided so as to obtain his settlement, though it was acquired before the division was made. A further fact should be noted, though it does not affect my opinion. It is this. The old parish of Tottenham was in the Edmonton Union, and contributed to the general poor rate over the entire union, and the two new parishes are in these respects in identically the same position.

Such being the state of things, Forrest was found chargeable in West Ham Union, and the guardians thereupon claimed that the parish of Wood Green, in the union of Edmonton, was the place of his last legal settlement, and obtained an order, subject to a special case, for his removal thither. The Courts below have considered that they are bound by express authority, and have decided upon the ground of authority, and not upon any independent opinion of their own, that Forrest's last legal settlement was not Wood Green. They felt constrained to hold that the division of the old parish of Tottenham into two parishes had the effect of destroying all the settlements theretofore acquired in the whole of the old parish.

I ought to say that, in my opinion, the cases which governed the decisions in the Courts below do lead to the conclusion which they reached. But your Lordships are asked to say that those cases, and especially *Tipton's Case* (1), which lies at the root of them all, were wrongly decided. Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they

(1) 3 Q. B. 215.

are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, I consider it is the duty of this House to overrule them, if it has not lost the right to do so by itself expressly affirming them.

Tipton's Case (1) decided that where one large parish had been cut into several parishes all the settlements theretofore acquired in the old parish were destroyed. The ground of the decision apparently was that a settlement is parochial, and, if the parish disappeared, there is nothing left to which the settlement can attach. I think that decision was wrong.

The inconveniences of such a rule are manifest. All who have acquired a settlement are at once divested of any right to be supported by those formerly chargeable with their maintenance and must continue to be relieved wherever they happen to be when want overcomes them. Its injustice to the ratepayers of other parishes who are compelled to rate themselves for the support of paupers not of their own, and so to bear a burden shifted by a technicality on to their shoulders from those who were formerly liable, is also manifest. I doubt if such a rule is reconcilable with the Poor Law Acts from that of Elizabeth onwards, which proceed upon the view that birth or residence creates a right to local maintenance. And it is certain that no express warrant can be found for a rule of that kind in any Act of Parliament.

The only logical foundation upon which the decision in *Tipton's Case* (1) could rest would be that when the identity of a parish is destroyed all rights against that parish are also destroyed. But your Lordships have decided that, if an additional area is annexed to a parish, the settlements theretofore acquired are not destroyed. And surely an addition will destroy identity as much as a subtraction. So that foundation goes, and I can see no other. It is, I think, erroneous to say that a settlement is parochial in the sense that it is indissolubly connected with the entirety of a parish.

A settlement is in a place which is a part of a parish, and, as

(1) 3 Q. B. 215.

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the parish is the unit of territory for poor law purposes, the settlement is in the unit. But the settlement still is in the place, and if that becomes part of a different area is not gone. Statutory provisions now exist for adjusting the burdens in case of change, but I think the settlement survived even under the old law.

I need not cite the other cases; they do no more than follow the decision in *Tipton's Case.* (1)

It is a satisfaction to me, in moving to reverse this judgment, that Cockburn C.J. and Blackburn J. plainly expressed their disapproval of the authority which I hope this House will now overrule, that similar views have been expressed in this House, and that Lord Denman C.J., who was responsible for that decision, appears himself to have had grave misgivings as to its correctness. This reversal of the Court of Appeal is merely formal, for the Lords Justices expressed no opinion of their own and merely followed an old authority.

EARL OF HALSBURY. My Lords, I am entirely of the same opinion. I am unable to follow the reasoning which has given authority to those cases to which my noble and learned friend on the woolsack has referred. How the division of a parish is supposed to interfere with rights already acquired, in this particular case a right acquired by birth in a particular spot, unless the statute itself deprived the owner of these rights, I cannot understand.

The only difficulty is that one has to consider a decision of as long ago as the year 1842. I do not think that is an absolute reason against a reversal of that decision, but undoubtedly it is an undesirable thing to upset any canon of construction or principle of law which has been settled for so long that people may be supposed to have acted according to it for a considerable time. But all these things must be governed, I think, by a reference to the subject-matter with which we are dealing; and certainly, if anybody could suppose that a principle of law was to be extracted out of the different poor law statutes which have been enacted, he must have a very acute sense to discover a principle. From first to last the poor law has been the

(1) 3 Q. B. 215.

subject of continual alteration. The first Act was the Act of Elizabeth, and how consistently with that it can be supposed that the right acquired, whatever that right is, can depend upon the unity of a parish I do not understand. There is nothing sacred about a parish, and as a matter of fact the Legislature has enacted that if a parish is too large you may have a separate poor law administration practically for a village, a hamlet, or a township. How the unity of the parish can make it impossible, after the parish is divided, to continue the rights which have already existed is one of those mysteries which I am unable to fathom. Anybody who looks at the history of the poor law and the mode of its administration will be amazed, I think, to imagine that there is any such sacred principle that rights already acquired should be got rid of simply by the alteration of the parish.

From time to time alterations have been made in the area of charge, which is now the union, not the parish. And in this particular case the two portions of the parish (I will call it) are in the same union.

These affiliated decisions, all flowing from one original decision, have never till now come before this House, and I am clearly of opinion that they ought to be overruled.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD ATKINSON. My Lords, I concur. The Court of Appeal have held that, as the administrative entity in which the pauper lunatic acquired a settlement has been divided and its identity thereby destroyed, the pauper's right to a settlement has been destroyed with it. They apparently considered that the case was governed by the case of the *Dorking Union* (1), and held themselves bound by that decision. The *Dorking Case* (1) was apparently based upon *Reg.* v. *Tipton.*(2) That case has, since the year when it was decided, been invariably followed, and almost as invariably disapproved of. In *Stourbridge Union* v. *Droitwich Union* (3) Cockburn C.J. said, in reference to it and to the other cases which followed it: "I never met with a case in

(1) [1898] 1 Q. B. 594. (2) 3 Q. B. 215.
(3) L. R. 6 Q. B. 769, 774.

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which the previous decisions were based on so faulty a principle. I cannot think that when a large parish, consisting of several townships, is, under 13 & 14 Car. 2, c. 12, s. 21, split into several places, each supporting its own poor, with overseers appointed, it was ever intended to abridge the effect of the 43 Eliz. c. 2." And Lord Blackburn expressed himself as follows: "The case is governed by a long series of decisions from *Reg.* v. *Tipton* (1) to *Reg.* v. *St. Martin, New Sarum.* (2) Looking at the reasons for those decisions, I think they were founded on a mistake, but we ought not lightly to overrule them." And Lord Lindley, in the *Dorking Case* (3) said: "As regards the decision in *Reg.* v. *Tipton* (1), which has been followed in many cases, all I shall say is that it put a very narrow construction upon the 13 & 14 Car. 2, c. 12, s. 21."

With the most profound respect for the great judges who decided *Reg.* v. *Tipton* (1), and in the most thorough accord with the great judges who disapproved of it, I may, for myself, say that it appears to me that the construction put by it on the statute of Charles II. not only plainly defeated the expressed purpose and object of that statute, but rendered its express language meaningless. The declared object of the 21st section of the statute of Charles II. was to enable the inhabitants, including, of course, the poor inhabitants, of those counties whose large parishes were to be split up into townships and villages, to reap the benefit of the statute of Elizabeth. To further that end these townships and villages were to be created administrative units, with overseers appointed over them, to carry out the latter statute. The poor in every township or village within the several counties were to be "maintained, provided for, and set to work within the several and respective townships and villages wherein he, she, or they shall inhabit, or wherein he, she, or they was or were last lawfully settled according to the intent and meaning of this Act." In the 1st section the various classes who can acquire a settlement are enumerated, and the main objects the statute was designed to attain are described. They are—(1.) to make more adequate provision for the poor, "so that none of them,

(1) 3 Q. B. 215. (2) 9 Q. B. 241.

(3) [1898] 1 Q. B. 594.

whether young or old, should perish for want of such supplies as are necessary"; (2.) to check vagrancy, with its attendant evils; (3.) to protect parishes from being burdened with the maintenance of those poor who might come to reside in them, though they had a settlement elsewhere, all of which objects were to be attained by the removal of such last-named persons to the parishes in which they were legally settled. It would, I think, be difficult to devise any way by which those objects could, in the counties mentioned in s. 21, be more effectively defeated than by holding, as was held in *Reg.* v. *Tipton* (1), that, by reason of the splitting up of these large parishes, all settlements in them should be swept away.

Again, I cannot find from the report of *Reg.* v. *Tipton* (1) that any effect was given to the words in which the right to a settlement in the township is referred to an existing right, or any reason whatever why the provision should be ignored, or treated as meaningless.

The clause as to "settlement" is clearly retrospective in character. It treats the right to a settlement in the township and villages as an existing right, to which certain of the poor were therefore entitled. It certainly appears to me to be more sound, and more rational, to construe the clause to mean that "natives of these townships and villages, or householders, apprentices, and servants within them for a space of forty days," should be taken to be settled there, than to hold that the Legislature referred to rights as existing which did not, and could not, exist at law, and yet did not use language adequate to create them.

In the *New Sarum Case* (2), not only does Lord Denman seem to express regret at the decision in *Reg.* v. *Tipton* (1), but he certainly appears to me have sacrificed the principle, that the extinction of the identity of the administrative entity sweeps away all settlement in that entity, in order to further the presumed object of the Legislature in passing, at the request of two parishes, a private Act to unite them. There was nothing in that case to shew that the parishes were not approximately equal in area and population. Each must have had its own administrative staff. One of them did not absorb the other. Nor was the identity of either preserved.

(1) 3 Q. B. 215. (2) 9 Q. B. 241.

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On the contrary, a united parish was formed, and designated by the name of a united parish. A new administrative entity was created; quite as truly and quite as effectually as new entities are created when an ancient self-governing parish is divided into several autonomous parts. Yet it was held there that the poor settled in each of the constituent parishes were entitled to a settlement in the united parish, Lord Denman observing that "it could not be supposed that the Legislature, when, by the request of the parishes, it passed an Act uniting them, ever could have intended that all settlements should be swept away." It might, I think, with equal force be asked, could the Legislature, when it passed the 36th section of the Local Government Act of 1894, have ever intended that all settlements should be swept away? The result would seem to me to be equally opposed to the presumed intention of the Legislature.

The parts of the ancient parish in the two urban districts are, under s. 36, sub-s. 2, to be separate parishes as if they had been constituted separate parishes under the 39 & 40 Vict. c. 61. When a parish is divided under this last-mentioned statute, and each of its parts is constituted a parish, the parish so constituted shall, under s. 6, be a parish to which overseers shall be appointed, and for all "other lay and civil purposes to which a parish may be liable or be entitled." The consideration that if, on the division of a parish into other self-governing entities, settlements were not swept away, the burden of maintaining certain paupers theretofore borne by the entire parish might, if thrown upon a particular township, be oppressive, can no longer apply. Union rating having been established by the 28 & 29 Vict. c. 79, the burden of Forrest's support would now be borne by the same ratepayers, whether he was settled in the ancient parish of Tottenham or the new parish of Wood Green. I am quite unable to come to the conclusion that the Legislature, by the Local Government Act of 1894, ever intended to sweep away settlements; and I think that, having regard to this fact, the technical doctrine as to the necessity for the continued identity of the administrative entity may be disregarded, and the language of s. 6 of the Act of 1876 be well held to mean that each new parish is to be treated as a parish for the civil

"purpose" of being held liable to maintain the poor properly belonging to it, namely, the poor who by birth or residence in it, have acquired a settlement in the larger entity of which it formed a part, and who would have thereby acquired a settlement in the new parish had it been autonomous when the birth or residence giving a settlement took place. Settlement in effect entails a local burden on the land. It is to be borne by the occupiers and owners of land, and results in the expenditure of the rates they pay. The determination of the extent of the administrative area is now a mere matter of convenience in each case, and whatever the area selected may be, it would appear to me but reasonable and just that the burden which settlement entails should be borne by the land within that area in which the event has happened or the act been done which entitles to settlement.

I concur, therefore, that this appeal should be allowed with costs, but agree with my noble and learned friend on the woolsack that in the state of the authorities the Court of Appeal were justified in the course they took.

Order of the Court of Appeal reversed, with costs both here and below.

Lords' Journals, November 20, 1907.

Solicitors: *F. E. Hilleary; F. Shelton.*

[HOUSE OF LORDS.]

H. L. (E.) 1907 *Nov.* 20.

ISIDORE CLIFFORD . . . . . Appellant;

AND

TIMMS . . . . . Respondent.

Dentists' Register—Order of Medical Council to erase Name—"Professional Misconduct"—Dentists Act, 1878 (41 & 42 *Vict. c.* 33), *ss.* 13, 14, 15.

One of the parties to a partnership deed between dentists was, as a director of the American Dental Institute, Limited, a party to self-puffing advertisements of the company in which it was alleged (inter alia) that among other advantages the instruments of the company were always sterilized before use, and that a trained lady nurse was always present at operations so as to prevent any possibility of scandal between an operator and a lady patient:—

Held, that the partner had been guilty of professional misconduct within the meaning of the partnership deed which entitled the other partner to determine the partnership.

Decision of the Court of Appeal, [1907] 2 Ch. 236, affirmed on the above ground.

The appellant and respondent, who were both registered under the Dentists Act, 1878, were parties to a partnership deed of 1899 for carrying on the profession or business of surgeon dentists. By clause 23, if either partner should be guilty of "professional misconduct," the other party should be at liberty to give notice in writing of his intention to dissolve the partnership, and thereupon it should be dissolved.

In 1906 the respondent gave the appellant notice in writing of his intention to dissolve the partnership, on the ground that the appellant had been guilty of professional misconduct. The appellant had in fact, as a director of a company called the American Dental Institute, been a party to publications which amounted to self-puffing advertisements of the company, and to disparagement of other dentists and their mode of operation. Among the other advantages said to be peculiar to this American company were the alleged facts: (1.) that a trained lady nurse was always present at dental operations so as to prevent

any scandal arising between an operator and a lady patient; (2.) that the dental instruments were always sterilized before being used.

A committee of the General Medical Council having held an inquiry and reported the above facts, the council made an order that the name of the appellant should be erased from the register.

The appellant having brought an action against the respondent claiming a declaration that the partnership was not dissolved, the order of the General Medical Council was tendered as evidence of professional misconduct by the appellant. Warrington J. held the evidence inadmissible, and decided in favour of the appellant. (1) The Court of Appeal reversed this decision and dismissed the action.

Sir Robert Finlay, K.C., and *H. Terrell, K.C.* (*Houston* with them), for the appellant, argued that the evidence was not admissible, either as prima facie evidence or as conclusive evidence of misconduct, and urged the reasons reported in the Court below. The House having pronounced no opinion upon this point, it is not necessary to repeat the reasons. It was also argued that the appellant was not in fact guilty of professional misconduct.

Upjohn, K.C., *Buckmaster, K.C.*, and *E. F. Buckley*, for the respondent, were not heard.

LORD LOREBURN L.C. My Lords, I am of opinion that this appeal must be dismissed.

The question is whether a particular dental practitioner has been guilty of professional misconduct and thus enabled his partner to cancel the arrangement between them. I do not think it in the least necessary to enter upon the legal question, interesting as it may be, which was discussed so much in the Court of Appeal. It seems to me to be a matter of indifference whether the order made by the General Medical Council be admitted in evidence or be excluded. What seems to me quite clear is this, that the form of advertisement which was sanctioned by the gentleman

(1) [1907] 1 Ch. 420.

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in question amounted in the circumstances to professional misconduct. I will not dwell upon the case. There was profuse advertisement in every form of self-praise and self-commendation on the part of this company, and of those who carried on business under its authority. I express no opinion upon that, standing alone.

For the present purpose it is enough to say that there were two particular advertisements which I consider to be thoroughly discreditable, and to amount to professional misconduct of a serious and inexcusable kind. One of them was that which related to a suggestion that most, or nearly all, other dental practitioners omitted the necessary precaution of sterilizing their instruments, whereas those who carried on the business of this company were careful not to omit that precaution. Now that was a peculiarly dangerous form of disparagement levelled against other practitioners, because it was not levelled against any one in particular, and therefore the falsity of it could not have been vindicated in any action.

The second instance, which I deprecate still more strongly, is the report of an interview which appeared in the *Review of Reviews*, and which contained the undisguised suggestion that in cases—I will not apply strictly the numerical test suggested in the *Review*,—but in cases of English dentists it was at all events a not uncommon thing that advantage should be taken by the operator, in the case of a woman, of the absence of some other woman to guard her honour. I see nothing that can justify anything of that kind. It has all the elements of disgraceful imputation—it is so general that it cannot be denied, that it cannot be proved, and that it cannot be made the subject of investigation, yet it suggests to those who are sensitive about the honour of others who belong to them the most powerful motive to avoid other establishments and to seek relief from those who are engaged by this company, with the object and with the result of pecuniary profit. For my part, if this be not disgraceful conduct, if it be not professional misconduct, I know not what the terms mean.

EARL OF HALSBURY. My Lords, I entirely agree.

LORD MACNAGHTEN. My Lords, I agree.

LORD ATKINSON. My Lords, I agree.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, November 20, 1907.

Solicitors: *H. Percy Becher; Harry Wilson.*

[HOUSE OF LORDS.]

ISIDORE CLIFFORD AND RUBY EDMUND CLIFFORD . . . . . } APPELLANTS;

AND

PHILLIPS . . . . . RESPONDENT.

THIS appeal raised the same point as that decided in the foregoing case of *Clifford* v. *Timms*. (1)

Sir Robert Finlay, K.C., and *Houston* (*H. Terrell, K.C.*, with them), for the appellants.

Upjohn, K.C., and *E. Ford*, for the respondent, were not heard.

LORD LOREBURN L.C. My Lords, so far as the merits are concerned in this case, as regards the question of professional misconduct, there is no distinction between it and the case which your Lordships decided yesterday. Separate points are raised independently of the merits. The first point is that the notice does not correctly express the ground upon which the notice is based. That is true, but then the deed does not require the reason to be stated in the notice at all.

The second point is that the words "the other partners shall be at liberty to give notice" do not apply because here only one

(1) Ante, p. 12; [1907] 2 Ch. 236.

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partner seeks to give notice. The answer is that the clause is certainly ungrammatical, but whichever construction is adopted the clause is equally ungrammatical. When the context in clause 29 is looked at, it assumes that the right of giving notice arises when two of the three partners have been guilty of professional misconduct.

In my opinion the fair construction, upon reading the whole clause, is that put upon it by the Court of Appeal.

EARL OF HALSBURY. My Lords, I agree.

LORD MACNAGHTEN. My Lords, I agree.

LORD ATKINSON. My Lords, I agree.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, November 21, 1907.

Solicitors: *H. Percy Becher; Samuel Lithgow.*

[HOUSE OF LORDS.]

H. L. (E.) 1907 *Nov.* 21.

NELSON LINE (LIVERPOOL), LIMITED . APPELLANTS;

AND

JAMES NELSON & SONS, LIMITED . . RESPONDENTS.

Ship—Contract of Carriage—Construction—Liability of Shipowner—Unseaworthiness—Exceptions—"Damage capable of being covered or which has been paid for by Insurance."

A shipowner agreed to carry frozen meat by an agreement which was so ill thought out and ill expressed in self-contradictory sentences that it was impossible to feel sure what the parties intended to stipulate. Frozen meat shipped under this agreement arrived damaged owing to the unseaworthiness of the ship and the negligence of the shipowner's agents:—

Held, that there being no clear and express exemption, the shipowner

was not relieved from his duty to provide a seaworthy ship and to take reasonable care.

Decision of the Court of Appeal, [1907] 1 K. B. 769, affirmed on the above ground.

THE respondents shipped frozen meat on board the appellants' steamship under an agreement of which clause 10 provided as follows: "The owners are not to be liable . . . . for unseaworthiness or unfitness at any time of loading or of commencing or of resuming the voyage or otherwise and whether arising from breakage of shafts or any latent defect in hull boilers machinery equipment or appurtenances refrigerating or electric engines or machinery or in the chambers or any part thereof or their insulation or any of their appurtenances or from the consequences of any damage or injury thereto howsoever such damage or injury be caused provided all reasonable means have been taken to provide against unseaworthiness collision stranding jettison or other perils of the sea rivers or navigation of whatever nature or kind and howsoever such collision stranding or other perils may be caused and the owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance or which has been wholly or in part paid for by insurance nor for any claim of which written notice has not been given to the owners within forty-eight hours after date of final discharge of steamer. The above-mentioned exceptions shall apply whether the same be directly or indirectly caused or shall arise by reason of any act neglect or default of the stevedores master mariners pilots engineers refrigerating engineers tug boats or their crews or other persons of whatsoever description or employment and whether employed ashore on board or otherwise for whose acts or defaults the owners would in anywise in connection with the execution of this charter otherwise be responsible."

By clause 18: "When the steamer is ready to take in meat each voyage in the River Plate [*sic*] the charterers have liberty to inspect and satisfy themselves that the refrigerating machinery and insulation are in good working order and condition. The owners further undertake on any voyage when required by the charterers to have the refrigerating machinery and insulation of

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any steamer surveyed before the meat is taken on board by Lloyd's agent if available or if not available by some other surveyor to be nominated by him or failing appointment by him to be agreed upon by the parties and to supply the charterers if required with the agent's or surveyor's certificate that the said machinery and insulation are in proper working order and condition. The owners will in addition provide and pay engineers competent to work and keep the machinery in proper working order but the owners are not to be responsible for any defect deficiency or breakdown in the insulation or machinery or anything connected therewith or appertaining thereto however caused and whether existing before or after the shipment of the meat or the commencement or any resuming of the voyage or for any act default or neglect of engineers firemen stevedores labourers or other persons for whom they would otherwise be responsible. The protection given by this article to the owners is intended to be in addition to that given by article 10 but is subject to the proviso as to taking means to prevent unseaworthiness therein contained. . . . ."

The meat arrived in a damaged condition owing to the unseaworthiness of the ship and the negligence of the appellants' agents. The respondents had insured the meat and had been paid by the underwriters.

The respondents having brought an action against the appellants for damages, Bray J. gave judgment for the respondents for 23,900*l.* with costs, and this decision was affirmed by the Court of Appeal (Collins M.R., Cozens-Hardy and Fletcher Moulton L.JJ.).

Nov 4, 6. *J. A. Hamilton, K.C.*, and *Bailhache*, for the appellants, urged the arguments which are fully reported in the Court below.

Isaacs, K.C., *Scrutton, K.C.*, and *Atkin, K.C.*, for the respondents, were not heard.

Nov. 21. LORD LOREBURN L.C. My Lords, the plaintiffs shipped a cargo of meat on the defendants' vessel under an agreement of June 18, 1904. The cargo was lost by reason of

the vessel's unseaworthiness, which was due to the defendants' negligence, and in this action the sole question is whether or not they are freed from liability by certain words in the agreement.

If the words are considered by themselves, they seem to excuse the shipowners not merely from this, but from any imaginable liability, except such as by law cannot be underwritten. They run as follows: "The owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance, or which has been wholly or in part paid for by insurance."

But the whole agreement must be regarded, and especially the context of the clause in which this alleged exemption occurs. The words in question do not stand by themselves. They are at the end of a very long sentence, the earlier part of which is wholly without effect if the last part means what the defendants maintain.

Beyond that there are two potent considerations weighing heavily against the defendants.

One is that in this clause the words in dispute are preceded by an express provision dealing with the very subject of unseaworthiness and negligence, which would be flatly contradicted and overruled by the defendants' interpretation; and yet there follows immediately another sentence which assumes that this express provision is still operative.

The other consideration is that in the 18th clause, which is a later clause, the language used again shews that the parties supposed this same express provision still to be operative, whereas on the defendants' construction it had ceased to have any effect.

I am aware that on the alternative interpretation there would also be some redundancy in this agreement, but there would not be irreconcilable stipulations in one and the same clause.

If I were obliged to affix a definite meaning to the disputed language, I should prefer the plaintiffs' construction. But in truth I think the clause, taken as a whole, so ill thought out and expressed that it is not possible to feel sure what the parties intended to stipulate. The law imposes on shipowners a duty to provide a seaworthy ship and to use reasonable care. They may contract themselves out of those duties, but unless they prove

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such a contract the duties remain; and such a contract is not proved by producing language which may mean that and may mean something different. As Lord Macnaghten said in *Elderslie Steamship Co.* v. *Borthwick* (1), "an ambiguous document is no protection." That is the ground on which I rest my opinion.

I wish to say, with the utmost respect for the arguments of counsel, I cannot agree in what I think was the contention, that there is a canon of construction by which the rigour of interpretation in some commercial documents must be proportioned to the importance of the stipulation to be construed. I know of only one standard of construction, except where words have acquired a special conventional meaning, namely, what do the words mean on a fair reading, having regard to the whole document?

I am afraid it is useless to draw the attention of commercial men to the risks they run by using confused and perplexing language in their business documents. Courts of law have no duty except to construe them when a question arises; but it is often very difficult. And sometimes what the parties really intended fails to be carried out because ill-considered expressions find their way into a contract.

The consequence of this will be that if the House adopts my view the appeal will be dismissed with costs. I move your Lordships accordingly.

EARL OF HALSBURY. My Lords, I am entirely of the same opinion.

The only observation I wish to add is one on the subject which the Lord Chancellor has just dealt with in reference to the language used by commercial men. Lord Blackburn used to say that the contest between commercial men and lawyers was that the commercial men always wished to write it short and the lawyers always wished to write it long; but a mixture of the two renders the whole thing unintelligible. I can quite understand that among commercial men documents passing from hand to hand, from hour to hour very often during the day, acquire a particular

(1) [1905] A. C. 93, at p. 96.

meaning, and when that is expanded the Courts will give effect to what is the known interpretation of such words.

But, my Lords, look at this document. Here is a document into which, apparently, the draughtsman has put every conceivable hypothesis that he could, but he has not been content to put into that document the sort of protective clause which might have an operative effect; he has gone on, as if he were a lawyer and were endeavouring to make the document as long as possible, to deal with every part of the subject again. Not unnaturally that sort of composition leads to what undoubtedly is the fact here, that the document contradicts itself. At one time it is said that the defendant could not be liable at all; at another time it is said: Subject always to this, that and the other, which shews that the parties intended that he should be liable under certain circumstances. How is it possible for any Court to give a real construction to such a document as that?

The result, therefore, of course is this. The known condition of the law is that unless protected by protective clauses the defendant is liable; he has only put together, or jumbled together, a number of phrases to which no legal interpretation can be given, and the result is that the state of liability under the law remains what it was and the defendant is liable.

Lord Macnaghten. My Lords, I entirely agree.

Lord Atkinson. My Lords, I concur.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, November 21, 1907.

Solicitors: *Charles Russell & Co., for Lightbound, Owen & MacIver, Liverpool; Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

[HOUSE OF LORDS.]

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COMMISSIONERS OF INLAND REVENUE . Appellants;

AND

MAPLE & CO. (PARIS), LIMITED . . . . Respondents.

Revenue—Stamp Duty—"Conveyance on Sale"—Matter or Thing to be done in the United Kingdom—Property in France—Conveyance executed in France—Consideration payable in England—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 1; *s.* 14, *sub-s.* 4; *s.* 54; *Sched. I.*

By a deed of "apport," executed in France, property in France was transferred by one English company to another English company, the consideration for the transfer being shares in the latter company which were to be issued, and delivered to the former company, in England. Stamp duty having been claimed as on a "conveyance on sale" in Sched. I. to the Stamp Act, 1891, on the ground that the instrument related to "a matter or thing to be done in the United Kingdom" within s. 14, sub-s. 4, of the Act:—

Held, that the instrument was a "conveyance on sale" within the meaning of the Act, and that it was liable to duty thereunder.

Decision of the Court of Appeal, [1906] 2 K. B. 834, reversed.

The facts involved in this appeal are stated in Lord Macnaghten's judgment.

May 1. *Sir R. B. Finlay, K.C.*, and *W. Finlay* (*Sir John L. Walton, A.-G.*, with them), for the appellants. Both companies are English companies, and the deed of "apport" was a conveyance on sale within the meaning of s. 54 of the Stamp Act, 1891. Valuable consideration passed from one party to the other. It is the instrument which is taxed, and not the transaction, and the necessity for stamping is irrespective of locality. By s. 14, sub-s. 4, the instrument, "wheresoever executed," cannot be produced in evidence, or "be available for any purpose whatever," unless it is stamped in accordance with the law in force at the time. Sect. 14, it is true, is not in itself a taxing section, but under it the untaxed instrument is made practically valueless, and it is a limitation or partial definition of the general taxation imposed by s. 1. The circumstance that the deed of "apport" is a French document, and must be construed

by French law, does not make it the less liable to contribute to British revenue. Walton J. held that the deed was a conveyance on sale; but held that no duty could be imposed as there was no obligation to state the consideration, as the instrument was not chargeable as a contract to sell, though it contained such a contract, because it was a contract to sell French property in France, and s. 59, by which contracts or agreements are made taxable, is confined to property in the United Kingdom. That is not so, because by s. 5 all the "facts and circumstances," which must include the amount of consideration, must "be fully and truly set forth." The transaction is not complete until certain requirements are fulfilled in England—the issue and allotment of shares. Fletcher Moulton L.J. is equally inaccurate in the statement that s. 14, sub-s. 4, imposes no duty to stamp. There is, indeed, no direct imposition of a tax, but, except for the purpose of evidence in a criminal case, the instrument is made inoperative. Farwell L.J.'s reasoning would exempt British subjects from taxation on any instrument executed abroad. But, the place of execution being under s. 14, sub-s. 4, immaterial, the case stands on precisely the same footing as *Great Western Ry. Co.* v. *Inland Revenue Commissioners* (1), a case of amalgamation of railways, and as *John Foster & Sons* v. *Inland Revenue Commissioners* (2), the conversion of a firm into a limited company. It is a conveyance on sale from one English company to another, necessitating the issue and delivery of shares in England.

Danckwerts, K.C., and *Beddall*, for the respondents. The "acte d'apport" is a French instrument, executed in France in accordance with French law, and deals with property situated in France. English revenue laws are directed to English, and not to foreign, property, and to instruments executed in England. The latter condition was laid down by Lord Mansfield in *Stonelake* v. *Babb.* (3) So *Ximenes* v. *Jaques* (4) and *Wright* v. *Inland Revenue Commissioners.* (5) Sect. 14, sub-s. 4, of the Stamp Act, 1891, is not a taxing section at all, and the words relied on, "wheresoever executed," do not impose duty on property otherwise

(1) [1894] 1 Q. B. 507.
(2) [1894] 1 Q. B. 516.
(3) (1770) 5 Burr. 2674.
(4) (1795) 1 Esp. 311.
(5) (1855) 11 Ex. 458

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exempt. The word "apport" does not suggest conveyance, and the instrument is not a conveyance on sale. The expert evidence of a French advocate stated that the deed is not a conveyance, not liable in France to conveyance duty, and of imperfect effect until further formalities are taken in a French Court. It is rather in the nature of partnership; there is no sole proprietorship transferred from one party to the other. There can be no tax in this country upon a decree, order, or certificate of a foreign tribunal. The proceedings necessary in this country —the issue and delivery of the shares forming part of the consideration—do not affect the essential character of the instrument. But, even if it were a conveyance on sale, this instrument would not be taxable. It would be a French transaction carried out in France under French law. It might also be regarded as a contract or agreement. Before the Revenue Act, 1889, agreements vesting the ownership in equity in one of the parties were exempt: *Inland Revenue Commissioners* v. *Angus*. (1) Sect. 15 of that Act was passed in consequence of that decision. But a French contract is not subject to duty. Even if the "acte d'apport" may be regarded in both aspects—conveyance and contract—the two are separable. Palles C.B. in *Adams* v. *Morgan* (2), referring to *Matheson* v. *Ross* (3), said that an instrument, which might be regarded in two aspects, in one of which it was taxable and the other not, could, though unstamped, be tendered in evidence in the aspect in which it was free from duty. Sect. 14, sub-s. 4, however, has no real bearing on the case, and s. 59 is also wholly inapplicable. This instrument is altogether outside the operation of English law. [They also cited *Thomson* v. *Advocate-General* (4); *Attorney-General* v. *Jewish Colonial Association*. (5)]

W. Finlay in reply.

The House took time for consideration.

Nov. 27. LORD MACNAGHTEN. My Lords, this case seems to me to be very plain and very simple. But I must express my

(1) (1889) 23 Q. B. D. 579.
(2) (1882) 12 L. R. Ir. 1, 11.
(3) (1849) 2 H. L. C. 286.
(4) (1845) 12 Cl. & F. 1.
(5) [1900] 2 Q. B. 556.

opinion with diffidence, because I find that the view which I venture to think so plain and so simple has been described by one of the learned Lords Justices, in a most elaborate judgment, as based on premises which are absurd and ridiculous.

There are no facts in dispute.

A trading company, limited by shares and registered in England, had a branch in Paris, with property there, both movable and immovable. For some reason or other it was thought good to separate the French business from the English. So on May 10, 1905, a company, limited by shares, was registered in England with the object of purchasing the French business. On June 5 following an instrument in the French language was executed in Paris, both by the old company and the new, whereby the old company transferred to the new company, as from a past day, the French business with all the property attached to it, and the new company purported to allot to the old company a specified number of shares out of its share capital.

In connection with the actual allotment of the shares which were the consideration of the purchase it was of course necessary to register the instrument of June 5 duly stamped. Under the Companies Act of 1900 default is visited with so heavy a penalty as to make it practically impossible to get shares allotted for a consideration other than cash without complying with the requirements of s. 7.

The Commissioners of Inland Revenue were asked to determine whether the instrument in question was or was not subject to duty, and to fix the duty, if any. Their opinion was that it was a "conveyance on sale" within the meaning of the Stamp Act, 1891, and that an ad valorem stamp was necessary.

There is no question now raised as to the amount of duty, if duty is payable. But both Walton J. and the Court of Appeal (Lord Collins, then Master of the Rolls, dissenting) decided that the instrument was not a conveyance chargeable under the Act of 1891. From that decision the present appeal has been brought.

I think that there can be no doubt that the deed of June 5, 1905, is a "conveyance on sale" within the meaning of the Act of 1891, having regard to the definition contained in s. 54. It is

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an "instrument whereby . . . . property . . . . upon the sale thereof is transferred to . . . . a purchaser." According to French law, too, if that be material, it is a conveyance on sale, although it appears that in the absence of registration a purchaser without notice might obtain a preferential title.

Then comes the question, How is the expression "conveyance on sale" to be understood? What limitations are to be placed upon it? Is it to be limited to conveyances executed in the United Kingdom? Such a limitation would be unreasonable when the instrument operates on property situate in the United Kingdom. A trip across the Channel would afford ready means of evading duty. Now s. 14, sub-s. 4, of the Stamp Act, 1891, shews that it was not intended so to limit the expression. Why may not that sub-section be referred to for the purpose of shewing that conveyances on sale executed abroad are chargeable with duty when they relate "to any matter or thing done or to be done in any part of the United Kingdom," as well as when they relate to any property situate in the United Kingdom?

Speaking for myself, I have some difficulty in seeing why it should be assumed that this instrument does not relate to property situate in the United Kingdom. The Act speaks of the "instrument." The provision is not confined to the operative part of the instrument. It speaks of the instrument as "relating to" certain subjects. There is no expression more general or far-reaching than that. This instrument relates to the capital of the new company, out of which it was agreed that a specified number of shares should be appropriated and allotted to the old company. The share capital of the new company, if it was situated anywhere, was situate in England. In my opinion this instrument does relate to property situate in England. Be that as it may, it certainly relates to something to be done in England. It relates to the registration in the name of the old company of shares which were to be allotted in an English company as the consideration for the purchase of the French property.

I agree with the judgment of Lord Collins in the Court of Appeal. I think judgment should be entered in favour of the

Commissioners, with costs here and below, and I move your Lordships accordingly.

LORD ASHBOURNE. My Lords, I concur.

LORD JAMES OF HEREFORD. I agree.

LORD ATKINSON. My Lords, I concur.

Order of the Court of Appeal reversed, with costs here and below.

Lords' Journals, November 27, 1907.

Solicitors: *Solicitor of Inland Revenue; Peake, Bird, Collins & Co.*

[HOUSE OF LORDS.]

WEST LEIGH COLLIERY COMPANY, LIMITED . . . . . } APPELLANTS;

AND

TUNNICLIFFE & HAMPSON, LIMITED . RESPONDENTS.

Damage—Subsidence—Measure of Damages—Risk of Future Subsidence—Remoteness.

In assessing the damages recoverable by a surface owner for subsidence owing to the working of minerals under or adjoining his property, the depreciation in the market value of the property attributable to the risk of future subsidence must not be taken into account. To recover damages the surface owner must wait until the damage or injury caused by subsidence has happened.

Decision of the Court of Appeal, [1906] 2 Ch. 22, reversed; and decision of Swinfen Eady J., [1905] 2 Ch. 390, restored.

THE facts material to this appeal are stated in the judgments of Lord Ashbourne and Lord Macnaghten.

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July 9, 11. *C. A. Russell, K.C.*, and *Jessel, K.C.* (*Leslie Scott* with them), for the appellants. No cause of action arises until there has been an actual subsidence; and then compensation is due to the surface owner. Damages can be recovered every time that a subsidence happens. The mere apprehension of future subsidence, or the depreciation in the value of the property, is no element of damage. Otherwise compensation might be awarded more than once; there might be damages for an actual subsidence, plus the apprehension of a future subsidence, and then for that future subsidence when it happens. This is the doctrine laid down by Willes J. in *Bonomi* v. *Backhouse* (1), and approved on appeal to this House. (2) In *Lamb* v. *Walker* (3) Cockburn C.J., in dissenting from the other judges, excluded mere apprehension, even amounting to certainty, from consideration. Cockburn C.J.'s view of the law was expressly approved in this House in *Darley Main Colliery Co.* v. *Mitchell.* (4) Depreciation in value was also held not to be an element of damage in *Battishill* v. *Reed* (5), and in *Rust* v. *Victoria Graving Dock Co.* (6)

Cripps, K.C., and *Langdon, K.C.* (*F. L. Wright* with them), for the respondents. The surface owner has a proprietary right to support, and compensation is due for subsidence and as often as there is a subsidence. But the subsidence involves a present deterioration in value, for which the surface owner is entitled to compensation. This is not covered by the damages payable on a second subsidence, for that subsidence is of an already diminished property. The original subsidence is of, say, property X; the subsequent one is of property X—Y, and unless Y is accounted for the owner suffers an injury for which he has received no redress. Compensation was allowed for the diminished value of property in *Cowper-Essex* v. *Acton Local Board* (7), and the principle was recognized by Bowen L.J. in *Mitchell* v. *Darley Main Colliery Co.* (8), which was affirmed in this House. The question here is one rather of detail than of principle, and all that is contended for is that the present deterioration in selling

(1) (1859) E. B. & E. 622, 654.
(2) (1861) 9 H. L. C. 503.
(3) (1878) 3 Q. B. D. 389.
(4) (1886) 11 App. Cas. 127.
(5) (1856) 18 C. B. 696.
(6) (1887) 36 Ch. D. 113.
(7) (1889) 14 App. Cas. 153.
(8) (1884) 14 Q. B. D. 125, 138.

value brought about by a past subsidence is an element in the assessment of damages for that subsidence.

C. A. Russell, K.C., in reply.

The House took time for consideration.

Dec. 2. LORD MACNAGHTEN. My Lords, I agree with Swinfen Eady J. and the late Lord Justice Sir R. Romer.

I think that this case is concluded by authority. In my opinion it is impossible to reconcile the judgment under appeal with the principles laid down in this House in *Backhouse* v. *Bonomi* (1) and *Darley Main Colliery Co.* v. *Mitchell.* (2)

It is undoubted law that a surface owner has no cause of action against the owner of a subjacent stratum who removes every atom of the mineral contained in that stratum, unless and until actual damage results from the removal. If damage is caused, then the surface owner "may recover for that damage," as Lord Halsbury says in the *Darley Main Colliery Case* (3), "as and when it occurs." The damage, not the withdrawal of support, is the cause of action. And so the Statute of Limitations is no bar, however long it may be since the removal was completed; nor is it any answer to the surface owner's claim to say that he has already brought one or more actions and obtained compensation once and again for other damage resulting from the same excavation.

If this be so, it seems to follow that depreciation in the value of the surface owner's property brought about by the apprehension of future damage gives no cause of action by itself. That was the conclusion reached by Cockburn C.J. in his dissentient judgment in *Lamb* v. *Walker* (4), which was approved in this House in the *Darley Main Colliery Case.* (2) I think, as the Chief Justice thought, that this conclusion necessarily follows from the principles asserted by the noble and learned Lords who took part in *Backhouse* v. *Bonomi* (1), and particularly by Lord Cranworth and Lord Wensleydale. But if depreciation caused by apprehension of future mischief does not furnish a cause of action by itself, because there is no legal wrong, though

(1) 9 H. L. C. 503.
(2) 11 App. Cas. 127.
(3) 11 App. Cas. 127, at p. 135.
(4) 3 Q. B. D. 389.

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the damage may be very great, it is difficult to see how the missing element can be supplied by presenting the claim in respect of depreciation tacked on to a claim in respect of a wrong admittedly actionable.

If one examines this claim in respect of depreciation, and tries to investigate its origin, it will be found, I think, that it really depends upon a notion, which is now exploded, that the right of the surface owner is a right in the nature of an easement, or a right to have pillars of support left for his security, while, in reality, his right, as Lord Wensleydale observes, is merely the right of a landowner to the ordinary enjoyment of his land.

Speaking for myself, I cannot help thinking that a surface owner who complains of depreciation in the value of his property caused by underground workings is not wholly free from blame himself. In a sense it is his own folly. He has erected buildings or acquired buildings erected upon ground which is, or may be, undermined. So long as there are no underground workings, or it is taken for granted that his buildings rest upon a foundation that is solid throughout, all is well. But when it becomes known from some accident in the neighbourhood, or from evidence given in Court, or in some other way, that his buildings have beneath them a cavity or hollow, then people begin to think that it is probable, or at least possible, that some day his land, with the buildings upon it, may be let down. The secret has come out, and the character of his property suffers in public estimation. In truth, surface ground, with a stratum beneath it belonging to a different owner from which the minerals have been or are liable to be removed, is not justly entitled to the credit of absolute stability.

I am of opinion that the order appealed from should be reversed and the judgment of Swinfen Eady J. restored, with costs here and below, and I move your Lordships accordingly.

LORD ASHBOURNE. My Lords, this action is brought to recover damages for injury by subsidence owing to the removal of minerals, and the official referee who considered the question of what damages the plaintiffs were entitled to awarded two separate sums. As to the cost of all the repairs necessary, he measured

the damages at the sum of 1300*l.*, and he assessed the damages for the depreciation of the premises at 13,200*l.* It is the latter sum which has been the subject of controversy before your Lordships.

The broad objection urged against it by the appellants is that it is inconsistent with former decisions of this House in the well-known cases of *Backhouse* v. *Bonomi* (1) and *Darley Main Colliery Co.* v. *Mitchell.* (2) It was urged by the appellants that this large sum is mainly composed of an allowance for the risk of future damage, and that, as they must remain liable for any future subsidence if it occurs, they may thus have to pay twice over for the same loss. The excavations in themselves give no right of action. It is only the damage caused to the respondents' right of enjoyment of their property by a subsidence caused by the excavations that gives any right of action. Before any subsidence it might be that the known excavations and the fears resulting therefrom would cause a depreciation in the value of the property for which no action would lie. The fear of a subsidence, although founded on the known fact of extensive excavations, cannot give any cause of action, even although there may have been already a subsidence. This is clear from the two cases already referred to, and cannot now be questioned. If no action for interfering with the enjoyment of property can be brought before a subsidence, could it be urged that a comparatively small subsidence, the consequences of which could be repaired for far less than 1300*l.*, would give a right to an inquiry for depreciation which might result in the large figure here awarded by the official referee? There is no secret about these large excavations. They are, I should think, always known to the owners and occupiers in the neighbourhood. There may be a certain amount of uneasiness in the minds of those whose lands are near or adjoin, but each party has clear rights. The mine owner can excavate all he thinks worth taking, subject to the risk of an action on the part of those whose enjoyment of their property he may interfere with, and those who are so interfered with may bring actions as often as a fresh subsidence takes place and their enjoyment of their property is so interfered with.

(1) 9 H. L. C. 503. (2) 11 App. Cas. 127.

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It has been strongly urged before your Lordships that if the depreciation in the present value of the property by the fear of future damage is not now compensated for, an injustice will be done to the owner, because a purchaser will now give much less for the property on which the subsidence has taken place. It is pressed that the loss that may so arise is part of the damage now recoverable by reason of the present subsidence. The Master of the Rolls puts it: "The first subsidence has established that the plaintiffs' mills are within the area of danger created by the act of the defendants. They have been changed from the position of premises presumably stable into that of premises presumably unstable." But the fact of the excavations was what constituted the area of danger and of fear, and that would not justify the owner on the occasion of the first subsidence in making such a claim. An owner can bring a fresh action for the damage caused by each fresh subsidence, but he cannot recover anything for the risk of future damage. To give damages for depreciation because a purchaser, from the fear of future damage, would give less after the subsidence would be a method of doing that which the law as laid down in this House would not sanction.

Cockburn C.J. well put the position in his judgment in *Lamb* v. *Walker* (1), which has been accepted as law: "Taking the view I do of the leading case of *Backhouse* v. *Bonomi* (2), I am unable to concur in holding that in addition to the amount to which he may be entitled for actual damage sustained through the excavation of the adjacent soil by the defendant, the plaintiff is entitled to recover in respect of prospective damage, that is to say, anticipated damage expected to occur, but which has not actually occurred and which never may arise."

I am glad, however, to note that Swinfen Eady J. did not limit his judgment to the 1300*l.* for repairs, but has sanctioned a reference back to the official referee to "assess the damages in respect of depreciation of the premises." As the learned judge says: "A mill which has been much cracked and injured, and with walls bulging, and out of plumb, although repaired, is manifestly not of the same selling value as before it was injured. The repairs are very far from entirely reinstating it, and the

(1) 3 Q. B. D. 389. (2) 9 H. L. C. 503.

loss to the plaintiffs is the same, whether the mill be sold and the loss realized, or whether the mill be retained by the plaintiffs its value being reduced."

In my opinion the appeal should be allowed and the judgment of Swinfen Eady J. restored, with costs here and in the Court below.

LORD JAMES OF HEREFORD. My Lords, it is after some hesitation, and with considerable reluctance, I have come to the conclusion that the judgment delivered by my noble and learned friend Lord Macnaghten contains a correct application of the principles of law governing this case. I come to that conclusion on the ground that the authorities quoted by my noble and learned friend bind us and must prevail.

Although I much doubt if justice to either party to this suit is certain to be secured by further litigation, I think it should be made clear that your Lordships' judgment proceeds upon the ground that if further surface damage should occur a just claim for damages may from time to time arise, and the plaintiffs in this action may make a further claim for damage at that time arising.

I would only add that, whilst I concur in the result of my noble and learned friend's judgment, I prefer for the present withholding my full acquiescence in the views expressed by my noble and learned friend towards the end of his judgment as to the rights of a surface owner for damage.

LORD ATKINSON. My Lords, I concur. I admit that during the progress of the argument I entertained some doubt as to whether this case was covered by the authorities cited in your Lordships' House, to which my noble and learned friend Lord Macnaghten has referred. On consideration, however, I agree with him. In my view, to give damages for depreciation in the market value due to the apprehension of future injury by subsidence is to give damages for a wrong which has never been committed, since it is the damage caused by subsidence, and not the removal of minerals, which gives the right of action.

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WEST LEIGH COLLIERY COMPANY, LIMITED v. TUNNICLIFFE & HAMPSON, LIMITED.

LORD LOREBURN L.C. My Lords, I have read the opinion just given by Lord Macnaghten, and I so entirely agree in his conclusion, and the reasoning by which it is reached, that little is left for me to add.

I see no middle course between saying one of two things—either a surface owner is to recover once for all for the entire diminution in the value of his property which may arise from the fact that the mineral owner beneath him has excavated, or the surface owner can recover only for the actual physical damage so caused as and when it occurs. The former alternative would be inconvenient and capricious in its results; but it need not be discussed, because it is excluded by authority of the highest order. The latter is affirmed as law by equally high authority, and draws with it the result that the compensation disputed in this case cannot be allowed. To say that the surface land would sell for less because of the apprehension of future subsidence is no doubt true. To say that the depreciation in present value caused by that apprehension ought to be included as an element of compensation is, in my view, unsound. For that is asking compensation, not for physical damage which has in fact arisen, but for the present influence on the market of a fear that more such damage may occur in future. Etymological confusion lies at the root of many difficulties, and perhaps there has been in this subject something of the kind in regard to the use of the word "damage" or "damages." Be that as it may, I am unable, with the utmost respect, to agree with the opinion of the majority of the Court of Appeal. I think this appeal ought to be allowed.

Order of the Court of Appeal reversed: Order of Swinfen Eady J. restored, with costs here and below.

Lords' Journals, December 2, 1907.

Solicitors: *Fowler & Co., for Grundy, Lumb & Grundy, Manchester; Patersons, Snow, Bloxam & Kinder, for Wilson, Wright & Wilsons, Manchester.*

[HOUSE OF LORDS.]

SIR JAMES LAING & SONS, LIMITED . APPELLANTS; H. L. (Sc.) 1907 Nov. 25.

AND

BARCLAY, CURLE & CO., LIMITED . . RESPONDENTS.

Sale of Goods—Ship—Passing of Property—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 16, 18, 62—*Scottish Arrestment of Ship in course of Building.*

Where it appears to be the intention of the parties to a contract for the building of a ship that the vessel is not to be delivered and finally accepted until after an official trial off a foreign coast, and until after conditions of the contract have been fulfilled as to speed, consumption of coal, capacity, &c., the property in the ship does not pass to the purchaser while the vessel remains uncompleted, although the contract contains stipulations for the price to be paid by instalments at certain periods of construction.

The respondents, a Glasgow firm of shipbuilders, agreed to build two ships for an Italian firm, according to certain specifications and under the superintendence of an agent appointed by the Italian firm, for a certain amount payable by instalments at specified stages of construction; but delivery of the ships was not to be considered to be completed till they had passed trials at Greenock and off the Italian coast. Before the ships were fully constructed, but after several instalments had been paid, the appellants, an English firm of shipbuilders, arrested the ships in Scotland for a debt alleged to be due to them by the Italian company, but on a petition to the First Division of the Court of Session the arrestments were recalled:—

Held (affirming the decision of the First Division), that no intention was shewn in the contract to make delivery of or to pass the property in the ships before they were completed, and that the arrestments were properly recalled.

APPEAL from a decision dated November 7, 1907, of the First Division of the Court of Session, Scotland.

On October 26, 1907, a summons was signed at the instance of the appellants, Sir James Laing & Sons, Limited, shipbuilders, Deptford Yard, Sunderland, against Lloyd Sabaudo (Società Anonima per Azioni), an Italian company carrying on business as shipowners at Genoa, concluding for payment to the appellants of sums amounting in all to 220,091*l.* 14*s.* 9*d.*, due by that company to the appellants as the balance of the purchase price

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of three steamers built for and sold and delivered by the appellants to that company.

The appellants, on the dependence of said summons arrested (1.) the vessel No. 468, then lying in graving dock at Glasgow; (2.) a vessel, No. 469, then on the stocks in the shipbuilding yard of Messrs. Barclay, Curle & Co., shipbuilders (the respondents); and (3.) the sum of 221,000*l.*, more or less, in the hands of the respondents, alleged to be due by them to the said Lloyd Sabaudo Company, together with all goods and gear in the respondents' hands belonging to the Lloyd Sabaudo Company.

On November 1, 1907, the respondents presented a petition to the First Division of the Court of Session, craving the Court to recall the whole arrestments above mentioned. To that petition answers were, on November 4, 1907, lodged by the appellants. The respondents stated that the ship No. 468 (which was practically completed) was due to leave the graving dock on November 6, 1907, to undergo her sea trials, and that the ship No. 469 was in course of construction, and would not be completed until January, 1908.

The above-mentioned ships were being built by the respondents for the Italian company under an agreement dated February 11, 1907, and ratified on March 11, whereby the respondents agreed to build and sell, and the Italian company agreed to purchase, two steel twin-screw steamers to be numbered 468 and 469 in the builders' yard at Whiteinch. The steamers were to be built according to certain specifications, and the agreement also contained the following stipulations: "The vessels to be built to special survey of the Society of British Lloyd Register of Shipping, and classed 100 A1," &c. "The vessels, when completed, to have steam trials or trials at sea off the port of Greenock and adjacent coast. The cost of such steam trial or trials shall be at the builders' expense, they finding crew for the safe navigation of the vessels, and for the engine department, also coal and engine stores." "Delivery to be considered completed after the satisfactory official trial provided for as follows: After the steam trial off the coast of Greenock mentioned above, the boats are to again undergo the official trial off the Italian coast, but all the costs of transporting

the ships from Greenock, the costs of the official trial, including insurance, coals, oils, stores, port and harbour dues, and any further expenses attached thereto, to be borne by the purchasers. The vessels will not be considered as delivered to and finally accepted by the purchasers until the said ships have passed the official trial trip in Genoa, have been approved in Genoa by the Italian emigration authorities, and all conditions of the contract have been fulfilled." "On completion of each of the steamers at Greenock upon the terms and conditions aforesaid, the builders shall, in exchange for the purchase-money due to them up to and including delivery instalment, and for a bank guarantee for the final instalment, hand over to the purchasers or their representative the" usual certificates. "The purchasers are entitled to appoint an expert to superintend the construction of the vessels and the machinery." "The steamers shall be at the risk of the builders until they finally leave the Port of Greenock, up to which date the builders shall keep them insured against fire and other risks to an amount equal to the purchase-money paid in advance." "The builders hereby undertake to construct the said vessels in full accordance with the rules and regulations of the British Lloyd and Registro Italiano and Italian emigration and American immigration rules in force at this date, and in conformity with the midship section, profile and deck plans approved by the British Lloyd and Registro Italiano, and by the purchasers' expert, and to carry out the construction of the said vessels with due care and skill." "Payable in cash instalments as follows for each steamer:—(1.) on the signing of the contract; (2.) when keel is laid; (3.) when framed; (4.) when plated; (5.) when launched; (6.) when handed over to owners after steam trials at Greenock; (7.) being the final instalment six months after delivery to owners at Genoa; this final instalment to bear interest from the date of delivery in Genoa until paid at the rate of four per cent. per annum." "When the vessel is handed over to the owners at Greenock, the builders to give owners the builders' and other certificates in exchange for the sixth instalment and a bank guarantee from the Società Bancaria Italiana, or other bank of equal standing, to be mutually agreed upon, for the payment of the seventh

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instalment when it falls due." "Genoa, 11th February, 1907." Then followed supplementary arrangements as to height of promenade deck, &c., agreed to by builders and owners in consideration of the payments of a further sum. The respondents contended that neither under the Sale of Goods Act, 1893 (1), nor the common law of Scotland had any property in the ships passed to the Italian company, and they petitioned the First Division of the Court of Session to recall the arrestments.

On November 7, 1907, the Lord President (Lord Dunedin) and Lords M'Laren and Kinnear, discharged the arrestments, holding that they were null and void, the vessels being prima facie the property of the respondents, and that there was no evidence that any property in them had passed to the Italian company. The Court also decided a subsidiary question as to the competency of the petition, it being strenuously submitted that in respect that the petition raised certain questions of disputed rights it was incompetent in a petition for recal to inquire into the question of property in the vessels, and that the arrestees, the respondents, must be left to find their remedy in the action of furthcoming which followed an arrestment. But the Court repelled this objection, taking the view that the cases relied on by the appellants did not apply to the arrestment of corporeal movables. This point was not argued on appeal.

(1) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71):—

Sect. 16: "Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained."

By s. 62 "specific goods" "mean goods identified and agreed upon at the time a contract of sale is made."

"(4) Goods are in a 'deliverable state' . . . . when they are in such a state that the buyer would under the contract be bound to take delivery of them."

Sect. 18: "Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof."

"Rule 5.—(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made."

The Lord President (Lord Dunedin) said, in his opinion: "It seems to me that if a person arrests a corporeal movable in the hands of somebody else, alleging it to belong to a third person, he has got at least to make a prima facie case for saying so; and if he cannot make a prima facie case, then the arrestee, who has had the corporeal movable in his hands arrested, is entitled to say—'No prima facie case has been made out; therefore, I am entitled to have the arrestment recalled.' But when a prima facie case is made out, then I hesitate to give any general definition, because I think each case will depend upon circumstances; it will depend upon circumstances in each case whether there should be an immediate determination of the question, or whether there might not require to be an inquiry. I mean, that although I think a petition for recall of arrestments is always, so far as may be, a summary process, yet I can imagine a case in which it would be right to have an inquiry. What I find in the present case is this—an uncompleted ship, that is to say, a ship that has not come into the position of being registered, when, of course, the proper title is the title of registration, but is still in the builder's yard. Prima facie it seems to me that ship belongs to the builders. Accordingly, if any one arrests the ship upon the ground that it does not belong to the builder, but that it belongs to somebody else, I think he is bound to give a prima facie reason for that assertion. In this case the respondents table what they say fulfils my desire. They table the contract under which, admittedly, the ship is being built, and accordingly this case is one of those cases where it is possible to give a judgment without further inquiry. We have here, admittedly, the document on which, and on which alone, the transference of the ship from the builders, who created it, to the third party, to whom it is now said to belong, depends.

"Accordingly, the question of whether this ship should be allowed to be arrested, as it has been, or whether the arrestment should be recalled, seems to me to turn upon the interpretation of the contract. I think the onus, so to speak, rests upon the person who wishes to shew that the ship belongs not to the builder to whom it would what I call naturally belong, but to

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some one else. We have the contract before us, and that brings one to the consideration of that branch of the law which has been much discussed in recent years; I mean the branch of the law which was illustrated in the case of *Simpson* v. *Duncanson*. (1) I do not think it is necessary for your Lordships to try to add anything more to the elucidation of what was really originally decided in *Simpson* v. *Duncanson*. (1) Probably a sufficient word, if not the last word, has been said about it in the judgment of Lord Watson in *Seath* v. *Moore*. (2) One cannot help feeling that probably the doctrine of *Simpson* v. *Duncanson* (1) had its origin in an endeavour to secure an equitable result in the teeth of what, at that time, was the very strict Scottish doctrine of the transfer of property, because there is no doubt that at the time of *Simpson* v. *Duncanson* (1) you might contract in what terms you pleased—you might contract that property should pass—and yet it was impossible to make the property really pass without delivery; I mean delivery in the fullest sense of the word, including all forms of what may be called constructive delivery. But all that has now been altered. It was altered to a large extent by the Mercantile Law (Scotland) Amendment Act (19 & 20 Vict. c. 60), although, as has been often pointed out, that Act did not really alter the true conception of where the property was, but merely interfered with the right which sellers and purchasers in old times would have had. But the whole matter has been really altered by the Sale of Goods Act (56 & 57 Vict. c. 71), and now it is quite clear that by the law of Scotland, if people choose so to contract, they can pass the property of a thing which is being sold without delivery. That being so, it seems to me clear, and I think it should be clearly laid down, that if people want these consequences to happen they must really say so. There is not the slightest difficulty in so framing a contract, if it is wished, as between a shipbuilder and the person who is buying the ship, that the property in a gradually constructed ship shall be held to pass at certain stages; but if so, I think it must be clearly said.

"My Lords, in the contract under discussion not only is that

(1) (1786) Mor. Dict. 14,204, and note to 6 App. Cas. 598 and 11 App. Cas. 362.

(2) (1886) 11 App. Cas. 350, 378.

not clearly said, but I think the other thing is said. I think that the only sale that is found in this contract is the sale of a completed ship. It seems to me to resemble in that respect the contract in *Reid* v. *Macbeth*. (1) Accordingly, I am of opinion, upon the construction of this contract, that the property of the ship was not passed from Barclay, Curle & Co., to whom, undoubtedly, it originally belonged, to the purchaser bit by bit, as it came into existence. That question we cannot decide in this process, as it is a question between Barclay, Curle & Co. and the Italian purchaser; but we can decide it to the effect of saying whether the arresters have made out a prima facie case. I hold, accordingly, that the arresters here have not made out any case for the ship being the property of the common debtor, and that the arrestments fall to be recalled."

Lords M'Laren and Kinnear delivered judgments to the same effect.

1907. Nov. 25. *James Avon Clyde, K.C.*, and *F. E. Smith* (with them *John Macgregor*) (the first and third of the Scottish Bar), for the appellants. One ship has sailed away, and the appeal only affects No. 469. The decision of the Court of Session was wrong. By the law of England and Scotland, when the price of a ship under a building contract is payable by instalments, according to the progress of the work the property passes to the purchaser at each period of the construction of the vessel, as soon as the work has been inspected and approved by the buyer's expert. The Sale of Goods Act, 1893, does not apply. Rule 2 of s. 18, on which the Court below founded, cannot refer to a ship in course of construction, for it does not come under the description of "specific goods." What are "specific" goods is denoted in s. 62; and, moreover, a contract for the sale of a ship to be built is not a contract for ascertained goods. Assuming the Act to apply, s. 16 is in the appellants' favour, as also was rule 5 of s. 18. But if it does not apply, the common law of Scotland, in the case of an executory contract such as this, is that there may be constructive delivery, and that where you have a provision for payment by instalments and for inspection by the buyer as the work

(1) [1904] A. C. 223.

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proceeds, the facts shew a purchase of goods which are to remain in the manufacturer's hands for completion, and the law regards that as equivalent to a transfer of the property. Lord Watson said in *Seath* v. *Moore* (1) that it appeared to him to be the result of the decisions that an intention or agreement to pass the property in the ship to the purchaser "ought (in the absence of any circumstances pointing to a different conclusion) to be inferred from a provision in the contract to the effect that an instalment of the price shall be paid at a particular stage, coupled with the fact that the instalment has been duly paid, and that until the vessel reached that stage the execution of the work was regularly inspected by the purchaser or some one on his behalf." These requirements for the passing of the property are present in this contract, namely, payment of instalments coupled with the buyers' inspection; and therefore the property in the ships in the shipbuilders' hands had passed to the Italian company to the extent of the instalments paid by them: see *Simpson* v. *Creditors of Duncanson* (2); *M'Bain* v. *Wallace & Co.* (3) and *Seath* v. *Moore* (1); and, in England, *Clarke* v. *Spence*. (4) Payment by instalments, and inspection, raise a strong presumption that it is the intention of the parties to pass the property to the buyer, and there is nothing in this contract against that presumption. One of the parties to the contract was a foreigner, and he might well ask, "What will become of these ships should the builder fail?" and the answer would be, "That does not matter to you," for the agreement is that the property shall pass on payment of instalments. This agreement is not against the interests of the builder, for if the instalments are not all paid, he has a lien on the ships. [They also commented on Bell's Com. 188, 189; *Reid* v. *Macbeth and Gray* (5); the former case of *Reid* v. *Macbeth and Gray* (6); *Orr's Trustee* v. *Tullis* (7); *Wylie and Lochhead* v. *Mitchell* (8); *Spencer & Co.* v. *Dobie & Co.* (9);

(1) 11 App. Cas. 350, 380.
(2) Mor. Dict. 14,204, and note to 6 App. Cas. 598 and 11 App. Cas. 362.
(3) 6 App. Cas. 588.
(4) (1836) 4 A. & E. 448.
(5) [1904] A. C. 223.
(6) (1901) 4 F. 345.
(7) (1870) 8 M. 936, 950.
(8) (1870) 8 M. 552.
(9) (1879) 7 R. 396.

M'Calmont v. *Rankin* (1); *Woods* v. *Russell* (2); *Laidler* v. *Burlinson* (3); *Wood* v. *Bell* (4); and Benjamin on Sales, 5th ed. pp. 361, 363.]

Scott Dickson, K.C., and *D. P. Fleming* (both of the Scottish Bar), for the respondents, were not called upon.

LORD LOREBURN L.C. My Lords, it is not necessary to trouble the learned counsel for the respondents in this case, because the question is whether the property passed, and whether the parties intended by the contract that it should pass. I do not know that any conclusive use can be made of a comparison with other contracts and the language that is used in regard to them in judgments. Speaking for myself, I always have some misgiving when presumptions in regard to the interpretation that is to be put upon particular words in a contract apart from their natural significance are put forward. It may be a very useful guide to look at other decisions, but, after all, the question is what the parties said and intended. The facts referred to by Mr. Clyde and Mr. Smith, namely, that the ship was to be paid for by instalments, and that there was a power of inspection on the part of the purchasers, may be marks pointing to the property passing, but it is not conclusive, and the question still remains as to what the contract really means.

I think the contract was for a completed ship, and the risk lay upon the builders until delivery, and there was no intention to make delivery or to part with the property until the vessel was completed. Under those circumstances, I think the appeal ought to be dismissed.

EARL OF HALSBURY. My Lords, I am of the same opinion. There is no doubt that a contract might be so framed as to give the purchaser power to claim the property in those parts which, when they are put together, make the complete ship; but in each case the question must be whether or not the contract has been such, and I think this has not been so made.

My Lords, I confess I follow the judgment of the learned Lord

(1) (1850) 19 L. J. (Ch.) 215.
(2) (1822) 5 B. & Ald. 942.
(3) (1837) 2 M. & W. 602.
(4) (1856) 5 E. & B. 772; 6 E. & B. 355.

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President in Scotland with one little exception. I think the phrase that he has used about the presumption being in favour of the builders perhaps was not sufficiently considered by him. Perhaps he did not think it necessary; but if he had used a different phrase—if as a matter of proof the wood, the iron, the nails, and so forth, which constituted the ship ultimately, are once the builders' and are proved to be the builders', it does become necessary to shew that there is some contract transferring that property under the circumstances to the purchaser; and if instead of saying there was a presumption that it belonged to the builders, and proceeding upon the presumption, he had said that the proof was that it was the builders' property, and it became necessary to shew that the builder had divested himself of the property, and to shew that by the words of the contract it had become the property of somebody else—if he had said that I should have entirely agreed. From the reasoning of the rest of the judgment I really do think that that is what the learned judge meant. It was not a considered judgment, I understand, and the phrase that there was a presumption that it belonged to the builder was one used in the course of the argument, and in the sense in which I have explained it, I should concur with it, otherwise I should not say that there was any presumption one way or the other. The question is, what is the contract, and by that contract to whom does the property belong?

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD ROBERTSON. My Lords, the question in the present appeal seems to me to be governed by the Sale of Goods Act, and, by that statute, to be determinable by the intention of the instrument under which the ship is built. In aid and supplement of construction, the statute supplies certain rules; but these may or may not come in operation, according as the contract requires it. In the present case I find the contract to require no aid or supplement from the statutory rules, for it

seems to me to provide from beginning to completion of this ship by the shipbuilders with their materials, and transfers it to the purchasers only as a finished ship and at a stage not in fact yet reached. This is a simple view of the matter; but in my judgment it is the sound one. It treats the Sale of Goods Act as superseding the previous law; and if in some instance it may be found necessary to revive and reconstruct the old common law for purposes of illustration, I can only say that that occasion has not yet come.

I therefore concur in the conclusion of the Court of Session, which rests on the contract. It seems right, however, to say that this does not imply my concurrence in all that is said, by way of statement of doctrine, in the judgments of the learned Lords. Some of them seem open to exception or at least criticism, but the judgments of the learned judges do not seem to have been at least minutely considered. Among matters of omission I think the fifth head of the 18th section of the Act is so directly applicable that it required perhaps more attention than it has received. But I do not require to enter on those disputable matters, as the ground of judgment which your Lordships adopt is common to us and to their Lordships of the First Division.

LORD ATKINSON. My Lords, I concur.

Ordered that the interlocutor appealed from be affirmed, and that the appeal be dismissed with costs.

Lords' Journals, November 25, 1907.

Agents for appellants: *Pritchard, Englefield & Co., for Steedman, Ramage & Co., W.S., Edinburgh.*

Agents for respondents: *Burchells, for H. B. & F. J. Dewar, W.S., Edinburgh.*

[PRIVY COUNCIL.]

J. C.* 1907

LOVELL & CHRISTMAS, LIMITED . . DEFENDANTS;

AND

June 20, 21; *Oct.* 31.

COMMISSIONER OF TAXES . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW ZEALAND, WELLINGTON DISTRICT.

New Zealand Land and Income Tax Assessment Act, 1900, *s.* 51—*Profits on Sales in London—Transactions of purchase in the Colony—Agency Commission—Profits not derived from Business in the Colony.*

Where the appellants' profits consisted of a commission deducted by them from moneys received in London under agency contracts of sales effected in London of goods brought from New Zealand as a result of transactions made by them in that Colony:—

Held, that the profits were actually made in London, and that the earlier transactions in New Zealand were insufficient to render those profits taxable under the New Zealand Land and Income Assessment Act (49 of 1900), s. 51, as profits derived from business carried on in that Colony.

APPEAL from a judgment of the Court of Appeal (April 11, 21, May 16, 1906) upon a special case stated by the parties.

The question decided was whether, under the provisions of the New Zealand Income Tax Acts, the appellant company, which is registered in England under the English Joint Stock Companies Acts, and carries on the business of provision salesmen on commission, is liable to pay income tax in New Zealand on profits derived by it from sales in England, on commission, of produce shipped by growers in and under arrangements and contracts made in New Zealand for sale by the company.

The course of the appellants' business is stated in their Lordships' judgment.

Sect. 51 of the Land and Income Tax Assessment Act, 1900, as amended by Act No. 37 of 1903, is in these terms: "Where the taxpayer is a company, its income derived from business shall, except in so far as the meaning of income is extended or

* *Present:* LORD LOREBURN L.C., LORD ASHBOURNE, LORD MACNAGHTEN, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

modified in the five next succeeding sections, be deemed to include all profits derived from or received in New Zealand from such business in each year ending at the close of the 31st day of March, including therein all profits falling within the definitions of 'income derived from business,' and 'income derived from employment or emolument,' in sections 59 and 60 hereof . . . . and income tax shall be assessed and levied on such income accordingly."

Sect. 66 is as follows: "In ascertaining the income derived from business employment or emolument no deduction shall be made in respect of any of the following items:

"(2.) Any loss or outgoing not actually incurred in New Zealand or not exclusively arising out of such business, employment or emolument."

The company made no return of income in respect of the profits made by it on its commission sales; and accordingly the respondent entered in the assessment roll an assessment for each of the years ending respectively on March 31, 1903, March 31, 1904, and March 31, 1905, on the sum of 10,000*l.*, being the amount on which, in his judgment, tax ought to be levied. The total amount of the tax due upon such assessment was 1500*l.*, of which sum the respondent claimed payment from the company.

The specific question raised in the special case was:—

"Is the company liable to be assessed for the payment of income tax under the provisions of the Land and Income Assessment Act, 1900, and the Acts amending the same in respect of the profits derived by it from the transactions and under the circumstances stated in the case?"

The full Supreme Court (Stout C.J. dissenting) decided that the appellants were liable to pay the 1500*l.* claimed.

In their reasons for their judgment the majority of the judges of the Supreme Court (Denniston, Edwards, Cooper and Chapman JJ.) considered that the case fell within the principle of the English case of *Erichsen* v. *Last* (1), and that where contracts from which profits result are made in New Zealand the profits are "derived from or received in New Zealand from such business

(1) (1881) 8 Q. B. D. 414.

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in each year," and so are liable to have income tax assessed on them. It was further considered by Denniston, Edwards, and Cooper JJ. that the construction put by the Supreme Court of the Colony in an earlier case by way of dictum (and not of decision) on s. 66, sub-s. 2, of the Act was erroneous, and that the provisions of that sub-section, if rightly construed, were consonant with good sense and justice.

Stout C.J., who delivered a dissenting judgment, was of opinion that the case fell within the principle of the decision in *Grainger* v. *Gough* (1) rather than that of *Erichsen* v. *Last* (2), and, though the case was on the border line, he thought, having regard to the provisions of the statute as to the outgoings incurred abroad being prohibited from being deducted from the gross profits, and to certain special provisions contained in the Act as to shipping companies and to the decisions of the Court of Appeal in New Zealand in *Commissioner of Taxes* v. *Kauri Timber Co.* (3) and *Commissioner of Taxes* v. *Eastern Extension Telegraph Co.* (4) (which has since been affirmed by His Majesty in Council, and is reported [1906] A. C. 526), that the question in the special case should be answered in the negative.

Danckwerts, *K.C.*, and *Schiller*, for the appellants, contended that the judgment of the Chief Justice was right, and that the respondent's claim should be disallowed. No profits or income is received by the appellants in New Zealand, or derived by them (i.e., arises or accrues to them) in New Zealand. The only profits made by them are received in London, and accrue and arise from the business carried on and transacted in London, and not in the Colony. The profits consist of commission received in London on sales effected there, and no profits of any kind are produced in the Colony by transactions in that locality. The procuring of the transmission of produce by the producers from New Zealand to London, to be there sold on commission, is not a carrying on of business in the Colony. If the appellants had

(1) [1896] A. C. 325.
(2) 8 Q. B. D. 414.
(3) (1904) 24 N. Z. L. R. (C. A.) 18, 30.
(4) (1904) 24 N. Z. L. R. 308.

purchased produce in New Zealand on their own account and had sold at a profit in England, their business would have been carried on and profits made in England, and in this case the profits by commission on sales in London are made exclusively in this country, and not in the Colony within the meaning of the Colonial Acts. Reference was made to *Commissioner of Taxes* v. *Eastern Extension Telegraph Co.* (1); *Commissioners of Taxation* v. *Kirk* (2); *Sulley* v. *Attorney-General* (3); *Watson* v. *Sandie & Hall* (4); *Grainger* v. *Gough* (5); *Commissioner of Taxes* v. *Kauri Timber Co.* (6)

Rufus Isaacs, K.C., and *G. Lawrence*, for the respondent, contended that the judgment of the majority was right. The alternative presented is, Are the colonial transactions a mere soliciting of custom or a carrying on of business in the Colony? Sect. 3 of the principal Act defines business as including "trade manufacture, adventure, undertaking and concern, and in the case of a company includes its business of whatever nature as set forth in its articles of association." The whole of the transactions narrated in the special case are business within the meaning of this section. It is mainly a question of fact; the governing factor in all cases, reconciling all the authorities, is the making of contracts in the Colony. The profits here arose out of contracts in the Colony in the sense that, but for those contracts, there would have been no profits. The commission on sales in London was derived from the colonial purchases as their source. In respect of those transactions of purchase the company was in fact carrying on business in New Zealand. The appellants' profits come within ss. 51 and 59 of the principal Act: see sub-ss. 1, 4, and 8 of the latter section. Reference was made to *Grainger* v. *Gough* (5); *Commissioner of Taxes* v. *Eastern Extension Telegraph Co.* (7)—which, rightly understood, are in favour of the respondent; *Erichsen* v. *Last* (8); *Werle & Co.* v. *Colquhoun* (9); *Commissioners of Taxation* v. *Kirk* (10); *Watson* v.

(1) [1906] A. C. 526.
(2) [1900] A. C. 588, 592.
(3) (1860) 5 H. & N. 711.
(4) [1898] 1 Q. B. 326.
(5) [1896] A. C. 325, 340.
(6) 24 N. Z. L. R. (C. A.) 18, 30.
(7) 24 N. Z. L. R. 308.
(8) 8 Q. B. D. 414.
(9) (1888) 20 Q. B. D. 753.
(10) [1900] A. C. 588.

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Sandie & Hall (1)—which, it was contended, are not in point: see also *Turner* v. *Rickman*. (2)

Schiller replied.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal against the judgment of the Supreme Court of New Zealand, by which it was decided that the appellant company was liable to pay income tax upon profits held to have been derived from New Zealand within the meaning of the Land and Income Assessment Act, 1900.

The facts of the case are set out, clearly and concisely, in the special case stated, by consent of the parties, for the opinion of the Court. The appellants sell goods in London on commission. The course of business is thus described:—

The defendant company became the agent of the owners of the New Zealand produce for the sale of such produce in the manner and under the circumstances hereinafter set forth:—

(*a*) The defendant company carries on in London the business of provision commission agents. Dairy produce is sent to the company in London from all parts of the world and sold by the company on commission.

(*b*) Mr. Harold Lovell is a salaried officer of the defendant company. He resides in and has no other business in New Zealand. Mr. Lovell's salary is 300*l*. per annum. The defendant company have established a credit at all the New Zealand banks at Hawera.

(*c*) Some time in each year Mr. Kowin, a servant of the company, arrives in the Colony, and Mr. Harold Lovell and Mr. Kowin together attend the meetings of the different butter and cheese factories and endeavour to persuade the directors to consign their season's output to the company to be sold in London on commission. The company instructs Mr. Kowin and Mr. Lovell of the amount to which it is prepared to make advances against produce. Then Mr. Kowin and Mr. Lovell enter into negotiations with the dairy companies and interview the directors, and offer verbally to make advances within the limit so fixed. The common practice then is that the secretary

(1) [1898] 1 Q. B. 326. (2) (1898) 4 Tax Cases, 25.

of the dairy company writes to Mr. Kowin stating that the dairy company accepts the proposals made by Messrs. Kowin and Lovell on behalf of the defendant company, and in some cases no reply is sent by Mr. Kowin, in some cases Mr. Kowin merely acknowledges, and in some cases Mr. Kowin acknowledges and confirms. The understanding arrived at is that all the produce shall be shipped to the defendant company in London, but in some cases there is no binding obligation to that effect. The defendant company advances through a bank in the Colony per lb. f.o.b. ocean steamer against shipping documents, the amount of advance being that previously arranged by Mr. Kowin and Mr. Harold Lovell with the directors, and then sells on commission in London, returning to the factories during the season any surplus made after deducting expenses and commission.

The enactment which has to be interpreted, and applied to these facts, is s. 51 of the Land and Income Assessment Act, No. 49 of 1900, which imposes a tax upon income derived from business, and derived from New Zealand, and the question that arises is whether the profits admittedly gained by the appellants fall within this enactment; in other words, whether the business from which the profits have been derived is a business carried on in New Zealand, in such a sense as to bring the profits within the scope of the New Zealand taxing Act.

The question is not free from difficulty, as is evidenced by the difference of opinion which has occurred in the Supreme Court.

The governing authority on this subject is the case of *Grainger* v. *Gough* (1), before the House of Lords, in which the earlier decisions were considered and appreciated. The language of the English Income Tax Acts and that of the New Zealand Act are not identical, but there is sufficient similarity in substance to make the English decisions authoritative as to the principles to be applied to the interpretation of the Colonial Act.

One rule is easily deducible from the decided cases. The trade or business in question in such cases ordinarily consists in making certain classes of contracts and in carrying those contracts into operation with a view to profit; and the rule seems to be that where such contracts, forming as they do the essence

(1) [1896] A. C. 325.

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of the business or trade, are habitually made, there a trade or business is carried on within the meaning of the Income Tax Acts, so as to render the profits liable to income tax.

Thus, in the numerous cases relating to the business of foreign wine-producers who ship their wines to England, the profits of such business have been held taxable in England when the contracts of sale of the wines were habitually made in England. So in *Erichsen* v. *Last* (1) the business in question consisted of collecting telegraphic messages in England and sending them abroad in consideration of payments made in England. It was held that the profits were taxable in England where the contracts which yielded those profits were entered into.

But the decisions do not seem to furnish authority for going further back, for the purpose of taxation, than the business from which profits are directly derived, and the contracts which form the essence of that business. In *Grainger* v. *Gough* (2) Lord Watson said: "There may, in my opinion, be transactions by or on behalf of a foreign merchant in this country so intimately connected with his business abroad that without them it could not be successfully carried on, which are nevertheless insufficient to constitute an exercise of his trade here within the meaning of Schedule D."

And his Lordship cited the case of *Sulley* v. *Attorney-General* (3), in which an American firm habitually purchased goods in England and shipped them to America for resale at a profit, and it was held that the profits were not taxable in England. So in *Grainger* v. *Gough* (2) itself, the case differed from the earlier wine trade cases in that the actual contracts of sale were not made in England, the transactions there being limited to canvassing for and securing orders, and therefore there was no taxation in England.

In the present case their Lordships are of opinion that the business which yields the profit is the business of selling goods on commission in London. The commission is the consideration for effecting such sales. The moneys received by the appellants, out of which they deduct their commission, and from which,

(1) 8 Q. B. D. 414. (2) [1896] A. C. 325, at p. 340.
(3) 5 H. & N. 711.

therefore, their profits come, are paid to them under the contract of sale effected in London. The earlier arrangements entered into in New Zealand appear to their Lordships to be transactions the object and effect of which is to bring goods from New Zealand within the net of the business which is to yield a profit. To make those transactions a ground for taxing, in New Zealand, the profits actually realized in London would, in their Lordships' opinion, be to extend the area of taxation further than the authorities warrant.

In the result their Lordships agree with the view of the case taken by Sir Robert Stout C.J. They will humbly advise His Majesty that the appeal should be allowed; that the question which the Supreme Court answered in the affirmative should be answered in the negative, and the judgment of that Court discharged except as regards costs. The respondent will pay the costs of this appeal.

Solicitors for appellants: *Lovell & White.*
Solicitors for respondent: *Mackrell, Morton, Godlee & Quincey.*

[PRIVY COUNCIL.]

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CORPORATION OF THE CITY OF TORONTO . . . . . } DEFENDANTS;

AND

CANADIAN PACIFIC RAILWAY COMPANY . . . . . } PLAINTIFFS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

British North America Act, 1867, *s.* 91, *sub-s.* 29; *s.* 92, *sub-s.* 10 (*a*)—*Dominion Railway Act of* 1888, *ss.* 187 *and* 188, *intra vires—Interpretation Act* (*R. S. C.*, 1886, *c.* 1), *s.* 7, *sub-s.* 2—*Construction*—"*Person.*"

The Railway Committee of the Privy Council of Canada, by order made under ss. 187 and 188 of the Dominion Railway Act (51 Vict. c. 29), directed certain measures to be taken for safeguarding the respondents' railway, which is a through railway, and for the protection of the public in traversing it at certain level crossings where it passes across public streets at points within or immediately adjoining the boundary of the appellant city, and directed the cost thereof to be borne in equal proportions by the railway and the city.

In a suit by the railway after the execution of works as directed to recover the apportioned amount from the corporation:—

Held, that ss. 187 and 188 were intra vires of the Dominion Legislature by force of the British North America Act, 1867, s. 91, sub-s. 29, and s. 92, sub-s. 10 (*a*).

Held, also, that, having regard to s. 7, sub-s. 2, of the Interpretation Act (R. S. C., 1886, c. 1), "person" in s. 188 includes a municipality.

APPEAL from a judgment of the Court of Appeal for Ontario (April 22, 1907), affirming a judgment of Mabee J. (October 3, 1906) in favour of the respondents.

By an order of the Railway Committee of the Privy Council of Canada (January 8, 1891), the respondent company was ordered to provide gates and watchmen at certain level crossings, to wit at Bathurst and Dufferin Streets, and at Avenue Road, mentioned in the said order; and it was further directed that one-half of the costs attending the placing and maintaining of the gates and watchmen be contributed by the appellants. The object of the

* *Present:* LORD ROBERTSON, LORD COLLINS, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

order was to protect the public from accidents in the operation of the respondents' railway system.

The question raised was whether this order, so far as it imposed liability on the appellants in respect of the costs of protecting the crossing, was valid and binding on the appellants. This involved the question whether ss. 187 and 188 of the Dominion Railway Act, 1888, under which the order was made, were intra vires of the Dominion. Sect. 187 authorized the Railway Committee, in the case of a railway constructed across any street or other public highway, at rail level or otherwise, to "require the company to which such railway belongs, within such time as the said committee directs, to protect such street or highway by a watchman, or by a watchman and gates or other protection."

Sect. 188 is as follows: "The Railway Committee may make such orders and give such directions respecting such works and the execution thereof, and the apportionment of the costs thereof and of any such measures of protection between the said company and any person interested therein, as appear to the Railway Committee just and reasonable."

The respondents sued to recover from the appellants the apportioned amount of their liability for works executed by the respondents under the above orders of the Railway Committee. The appellants contended that ss. 187 and 188 were ultra vires of the Dominion Parliament.

Mabee J. held that the case was governed by *In re Canadian Pacific Ry. Co. and County of York* (1) and *City of Toronto* v. *Grand Trunk Ry. Co.* (2), and decreed the suit.

The Court of Appeal affirmed this decision.

Sir E. Carson, K.C., Fullerton, K.C., and *W. N. Tilley*, for the appellants, contended that it was ultra vires the Dominion to enact legislation under which they could be charged for work either for a railway or a municipal purpose. They admitted that the respondents' railway was a work within the legislative jurisdiction of the Dominion, but submitted that the appellants

(1) (1896) 27 Ont. Rep. 559; (1898) 25 Ont A. R. 65.

(2) (1906) 37 Can. S. C. R. 232.

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were governed by provincial legislation. They could only be authorized to spend moneys for purposes directed by provincial legislation. They were not liable to be directed by the Dominion to contribute moneys for any purpose. Reference was made to the Consolidated Municipal Act of Ontario, 1903 (3 Edw. 7, c. 19), ss. 599, 600, 601, s. 606, sub-s. 1, and s. 611, as containing the only provincial legislation bearing on the subject, and it was contended that any liability imposed thereby did not apply in the case of a Dominion railway. The appellants are not liable to be taxed in aid of the respondents under any legislation, nor was it incidentally necessary to the carrying out of the railway that they should be. Further, the corporation is not a "person interested" within the meaning of s. 188. Reference was made to *Attorney-General for Ontario* v. *Attorney-General for Canada.* (1)

Sir R. Finlay, K.C., A. R. Creelman, K.C., and *Geoffrey Lawrence,* for the respondents, contended that s. 91, sub-s. 29, of the British North America Act gave to the Dominion exclusive jurisdiction over this railway. Consequently ss. 187 and 188 of the Railway Act, 1888, and the corresponding sections of the Railway Act of 1903 are intra vires of the Dominion Parliament as being ancillary to through railway legislation, notwithstanding that they affect civil rights. Reference was made to *Grand Trunk Ry. Co.* v. *Attorney-General of Canada* (2); *Madden* v. *Nelson and Fort Sheppard Ry.* (3); *Tennant* v. *Union Bank of Canada.* (4) Dominion legislation, where it is valid, is of paramount authority, even though it trenches on matters assigned to the province. The appellants are persons interested within the meaning of s. 188 of the former Act and s. 47 of the later Act: see also Interpretation Act (R. S. C., 1886, c. 1), s. 7, sub-s. 2, according to which "person" includes municipality. The orders of the Railway Committee and of the Board which succeeded it under the later Act are final, and bind the appellants: see *Williams* v. *Adams* (5); the Railway Act of 1903, s. 33; and s. 144 of the Act of 1888. Reference was also made to *City of Toronto* v. *Grand Trunk Ry. Co.* (6); *In re Canadian Pacific*

(1) [1896] A. C. 348, 359.
(2) [1907] A. C. 65.
(3) [1899] A. C. 626.
(4) [1894] A. C. 31, 45, 47.
(5) (1862) 2 B. & S. 312.
(6) 37 Can. S. C. R. 232.

Ry. Co. and County of York (1); *Ottawa Electric Ry. Co.* v. *City of Ottawa.* (2)

Fullerton, K.C., replied.

The judgment of their Lordships was delivered by

LORD COLLINS. The question on this appeal is as to the liability of the appellants, the corporation of the city of Toronto, to pay a share of the cost of certain protective measures ordered by the Railway Committee of the Privy Council of Canada for the purpose of safeguarding the public in traversing the respondents' railway, and the railway itself, at certain level crossings where it passes across public streets at points within or immediately adjoining the city boundary. At two of the crossings the southern boundary of the railway is the northern boundary of the city. In the third the crossing is wholly within the city.

The order of the Railway Committee, which was dated January 8, 1891, and purported to be made under the 187th and 188th sections of the Dominion Railway Act, 1888 (51 Vict. c. 29), directed that gates and watchmen should be provided and maintained by the railway company at the said crossings, and that the cost thereof should be borne in equal proportions by the railway company and the corporation. Some two years later there was a slight re-adjustment of the proportions, but nothing turns on this. The corporation continued to pay the adjusted proportion without complaint down to 1901, when they disputed liability and ceased payment. Hence this action, in which the railway sued the corporation to recover the apportioned amount. No question arises as to the amount, if liability is established, but the appellants contend that the sections under which the order was made were ultra vires of the Dominion Parliament, and that even if they were intra vires, the corporation did not fall within the words "any person interested therein" in s. 188, and could not, therefore, be made liable to pay any apportioned share of the expenses. Mabee J., the trial judge, decided against the corporation, on the ground that the point was concluded by cases decided in Canada binding upon him, and his judgment was affirmed by the Court of Appeal for Ontario.

(1) 25 Ont. A. R. 65. (2) (1906) 37 Can. S. C. R. 354.

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First, with regard to the question of ultra vires. There is no doubt that "railways connecting the province with any other or others of the provinces" are expressly excepted from the jurisdiction of the provinces and placed under the exclusive jurisdiction of the Parliament of the Dominion by the Imperial statute 30 & 31 Vict. c. 3, the British North America Act, 1867, s. 91, sub-s. 29, and s. 92, sub-s. 10 (*a*). On the other hand, by s. 92 of the same Act, municipal institutions in the province and property and civil rights in the province are placed under the exclusive power of the provincial Legislature. Questions of conflict between the two jurisdictions, that of the Dominion and that of the province, have frequently come before this Board, and the result of the decisions is thus summed up by Lord Dunedin, in delivering the judgment in the most recent case, *Grand Trunk Ry. Co.* v. *Attorney-General of Canada.* (1) He treats the following propositions as established :—

"First, that there can be a domain in which provincial and dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail."

In the present case it seems quite clear to their Lordships that if, to use the language above quoted, "the field were clear," the sections impugned do no more than provide reasonable means for safeguarding in the common interest the public and the railway which is committed to the exclusive jurisdiction of the Legislature which enacted them, and were, therefore, intra vires. If the precautions ordered are reasonably necessary, it is obvious that they must be paid for, and in the view of their Lordships there is nothing ultra vires in the ancillary power conferred by the sections on the committee to make an equitable adjustment of the expenses among the persons interested. This legislation is clearly passed from a point of view more natural in a young and growing community interested in developing the resources of a vast territory as yet not fully settled than it could possibly be in the narrow and thickly populated area of such a country as England. To such a community it might well seem

(1) [1907] A. C. 65, at p. 68.

reasonable that those who derived special advantages from the proximity of a railway might bear a special share of the expenses of safeguarding it. Both the substantive and the ancillary provision are alike reasonable and intra vires of the Dominion Legislature, and on the principles above cited must prevail, even if there is legislation intra vires of the provincial Legislature dealing with the same subject-matter and in some sense inconsistent. But it seems to their Lordships that in truth there is no real inconsistency, and both may stand together. The through railway is a subject-matter excepted out of the jurisdiction of the province, and there is no express provision in the British North America Act defining the jurisdiction of the province inconsistent with the right vested in the Dominion to provide for the safeguarding of the subject-matter thus excluded from the jurisdiction of the province. The jurisdiction conferred over property and civil rights in the province is quite consistent with a jurisdiction specially reserved to the Dominion in respect of a subject-matter not within the jurisdiction of the province. The rights in the highways conferred on the municipality by the sections of the Consolidated Municipal Act, 1903, 3 Edw. 7, c. 19 (Ontario), cited in the appellants' case, do not, in their Lordships' opinion, help the appellants at all on the ultra vires point, though they bear strongly against them on the point that they are not "persons interested."

With regard to this latter point, it is clear from s. 7, sub-s. 22, of the Interpretation Act, R. S. C., 1886, c. 1, cited by Sir R. Finlay, that the word "person" includes a municipality; and their Lordships fully concur in the conclusion and reasoning of Meredith J.A. in the Court below, that in this case the municipality was a person interested. It is not necessary to say anything upon the other points argued.

Their Lordships will, therefore, humbly advise His Majesty that the appeal be dismissed.

The appellants will pay the costs of the appeal.

Solicitors for appellants: *Freshfields.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.* 1907 *July* 17; *Dec.* 3.

McVITY AND ANOTHER . . . . . PLAINTIFFS;

AND

TRANOUTH AND ANOTHER . . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

R. S. O., 1897, *c.* 136, *s.* 87—*R. S. O.*, 1897, *c.* 133, *ss.* 4, 22—*Conveyance void as unregistered—Limitation.*

S. having obtained a registered conveyance of the land in suit from one of the respondents, executed, more than ten years before action, a reconveyance to both respondents, indorsing thereon a forged certificate of registration, and later on mortgaged it to the appellants within the said ten years:—

Held, that under s. 87 of the Registry Act, R. S. O. c. 136, the reconveyance was void against the appellants, who had advanced their money without notice of it.

Held, also, that the respondents were not protected by the Limitation Act (R. S. O. c. 133). The reconveyance was valid between the parties thereto, and no action could have been brought against them before the date of the appellants' mortgage, which was within the statutory period.

APPEAL from a judgment of the Supreme Court of Canada (June 26, 1905), affirming a decree of the Court of Appeal for Ontario (January 23, 1905), which reversed a decree of the Chancellor of Ontario (November 16, 1903).

In June, 1891, the respondent Rachael Tranouth (then Rachael Maxfield), being the owner in fee simple of the land in suit and about to marry the other respondent, instructed one Sootheran, a local conveyancer, to prepare the papers necessary to vest the ownership thereof in herself and her intended husband as tenants in common.

Thereupon Sootheran prepared a conveyance in the usual statutory form of the said land by Rachael Maxfield to himself and a separate reconveyance by himself to both respondents as tenants in common. He registered the conveyance to himself, but not the reconveyance, on which both parties agreed that he

* *Present:* LORD LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

forged a certificate of registration. Rachael Maxfield remained in possession of the land for the few days intervening between the conveyance and her marriage, and since then she and her husband were in possession.

In 1895 Sootheran executed the mortgage sued upon in this action for $2000 to the appellants, and registered it on August 30, 1895.

The action was commenced in May, 1903, more than the statutory period of ten years from the execution of the conveyances to and from Sootheran, but less than ten years from the execution of the mortgage to the appellants.

The respondents claimed that the appellants, having had actual notice of the respondents' possession prior to the date of the mortgage, were bound to make inquiry as to the nature of such possession, and the respondents also pleaded the Real Property Limitation Act of Ontario, being c. 133 of the Revised Statutes of Ontario, 1897, and relied in particular on ss. 4 and 22.

The trial judge (Boyd C.) held that the provisions of the Registry Act protected the mortgagees in the absence of actual notice of the unregistered reconveyance, and that actual notice of the respondents' possession was not sufficient; and on the point of limitation that there was no accrual of any right of action to the mortgagees until default had been made in payment of moneys secured by the mortgage.

The Court of Appeal unanimously reversed this judgment, on the ground that, as the Real Property Limitation Act conferred no new right of entry upon the mortgagees, and as in virtue of the Registry Act the reconveyance by Sootheran to the respondents of June 20, 1891, was made fraudulent and void and must be considered as fraudulent and void ab initio, the respondents must be considered to have been in possession adverse to the appellants and their predecessor in title since the year 1891, and therefore to have acquired a good title by possession.

The Supreme Court by a majority affirmed this judgment. Taschereau C.J. expressed no opinion, except that "to doubt was to confirm." Idington J., whose judgment accorded with that of the majority, said:—

"It is asked by the appellants, When did the right of entry

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accrue? They set up the outstanding estate vested in the respondents by Sootheran's deed to them to shew that it stood in the way of making entry until the mortgage to the appellants was registered.

"This deed is by virtue of the Registry Act made void as against the appellants. It is not made, it is said, absolutely void, but only as against the subsequent mortgage. I grant that. But how far is it necessary to make it void to enable the mortgagee to assert a good title to the legal estate?

"It must make it void back far enough to enable the mortgagee to shew a good paper title, and that means beyond the time when the unregistered title began.

"Then when it runs to that point there is presupposed an absence of any other legal estate. There cannot be two at the same time.

"There seems, therefore, no escape from the result that in this case, by the assertion of their title, the appellants of necessity obliterate, by force of the Act that they invoke for their protection, any title that the Court can in this case consider. The appellants cannot claim at one and the same moment a legal estate vested in them and also in their adversaries.

"This is after all only another way of saying and illustrating what the late Draper C.J. and others said in correct legal phraseology as to the unregistered deed being void ab initio."

H. J. Scott, K.C., and *Tilley*, for the appellants, contended on the point of limitation that the unregistered reconveyance by Sootheran to the respondents was by the true construction of the Registry Act relied upon (see s. 87) (1) void only as against subsequent purchasers or incumbrancers. It was valid between the parties. Therefore there was no adverse possession by the respondents against Sootheran, for he had no title and could make no claim. Until the mortgage to the appellants was registered

(1) "After any grant from the Crown of lands in Ontario and letters patent issued therefor, every instrument affecting the lands or any part thereof comprised in the grant shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless such instrument is registered in the manner herein directed, before the registering of the instrument under which the subsequent purchaser or mortgagee claims."

no one could sue the respondents in respect of their land, since they were rightfully in possession under a title which was good against Sootheran and all the world. Under those circumstances there was no cause of action which the statute could bar until one arose in favour of the appellants on the registration of their mortgage title, which was in 1895, within the statutory period, and was executed without any notice of the respondents' claim.

Robert Ruddy, for the respondents, contended that, irrespective of the reconveyance to them by Sootheran, they had a good holding title under the Real Property Limitation Act (R. S. O. 1897, c. 133), ss. 4 and 22, having been in possession of the land in suit for more than ten years prior to the appellants' action. That possession was adverse to Sootheran, the appellants' mortgagor, and s. 22 did not give to the mortgagee a new right of entry, other than he derived from his mortgagor. The effect of the Registry Act was to make the unregistered reconveyance by Sootheran fraudulent and void ab initio against the appellants: see *Stephen* v. *Simpson* and the dictum of Draper C.J. (1) Reference was also made to *Thornton* v. *France*. (2) The appellants must prove a title in them to eject superior to the respondents' title acquired by adverse possession. They cannot in the same suit assert a valid title in their mortgagor thence derived by them, and at the same time an invalid title in their mortgagor for the purpose of denying adverse possession against him by the respondents. The respondents' possession was at any rate adverse to that title in Sootheran which the appellants are compelled to assert as having passed to them; and if they deny his title, they deny their own. The respondents were in actual possession, and the appellants, who abstained from inquiry as to its nature, had sufficient notice of their title to satisfy s. 87 of the Registry Act.

Scott, K.C., replied.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The only question in this case is which of two innocent parties is to bear the loss occasioned by the

(1) (1869) 15 Grant's Upper Can. Rep. 594, 601.

(2) [1897] 2 Q. B. 143, 158.

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fraud of one Sootheran, a dishonest lawyer. One of the parties trusted him as professional adviser; the other dealt at arm's length with him as an honest man.

In their Lordships' opinion the question is concluded by the Act Rev. Stat. Ontario, c. 136, s. 87.

The appellants, who are mortgagees, took their mortgage from Sootheran, who was on the register as owner of the land which was mortgaged to them. The land had been conveyed to Sootheran by the female respondent on the occasion of her marriage with the other respondent to the intent that it might be reconveyed to both. Sootheran registered the conveyance to himself. He executed the reconveyance. But he failed to register it, and deceived his clients by producing a forged certificate of registration.

The Act makes every instrument affecting lands "void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless such instrument is registered." The reconveyance being unregistered was, therefore, void against the appellants, who advanced their money without notice. As between Sootheran and the respondents, the deed of reconveyance was perfectly valid. And consequently, before the date of Sootheran's mortgage to the appellants, no action could have been brought to recover the land. The mortgage was executed on August 30, 1895. The writ in this action was issued on May 12, 1903. The Statute of Limitations does not, therefore, afford any defence to the respondents. No other ground of defence was seriously argued at the hearing before this Board.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, and the orders of the Court of Appeal for Ontario and the Supreme Court of Canada discharged with costs.

The respondents must pay the costs of this appeal.

Solicitors for appellants: *Poole & Robinson.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

ZACKLYNSKI AND OTHERS . . . . . PLAINTIFFS;

AND

POLUSHIE AND OTHERS . . . . . DEFENDANTS.

J. C.*
1907
July 17, 18, 19, 20, 22; *Dec.* 3.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Declaration of Trust in Favour of the Greek Orthodox Church—Construction—Ascertainment of Beneficiaries—Exclusion of Roman Catholic and Uniate Churches.

Emigrants from Galicia settled in the North-West Territories from 1892, and in 1896 there were thirty Galician families in the neighbourhood of Star, who resolved to provide a place for religious worship and secure the services of a priest.

In Galicia the population is divided between Poles and Little Russians, the former being Roman Catholic, the latter Orthodox Greek, who, as a condition of being allowed to use their own liturgy and conduct their services in the old Slavonic language, are compelled to acknowledge the supremacy of the Pope, all else being allowed to remain Greek. There results a composite Church known as the Uniate Church, liable in Galicia to taxation by the Pope, in consequence of its enforced union with Rome.

The respondents, trustees of the Star congregation, on December 7, 1897, obtained from the Land Office a permit to cut logs for a church on the Government land in suit, "to be used in the erection of a church building for the mission of the Greek Orthodox Church and for no other purpose":—

Held, that this permit being an invitation to the trustees to build a church on the land in suit, the land became when the permit was acted on impressed in the hands of the Government with a trust for that purpose, and was dedicated by the Government to the use of the mission of the Greek Orthodox Church and not of the Roman Catholic or Uniate Church.

In an action by the appellants as representative members of the Star congregation for relief as for a breach of trust in consequence of the respondents having without previous consultation with the congregation appointed an Orthodox priest, it appeared that after the permit was granted the lands in suit had been irregularly granted by the Land Office to the Roman Catholic bishop of the diocese in which Star was situated, "in trust for the purposes of the congregation of the Greek

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* *Present:* LORD LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

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Catholic church" at Star, and had been by the bishop assigned to the respondents with the sanction of the Land Office, but without any alteration in the declaration of trust contained in the grant to the bishop :—

Held, that the operative trust was that created by the permit, and that there had been no breach thereof.

APPEAL by special leave from a judgment of the Supreme Court of Canada (February 20, 1906), reversing a decree of the Supreme Court of the North-West Territories (January 10, 1905), which had affirmed the judgment of the trial judge, Scott J. (March 25, 1904).

The only question involved was in substance whether the respondents are entitled as trustees of the church and land in suit to hold the same, as they contended, for the purposes of a Greek Orthodox church, that is, of a church independent of the authority or control of the Roman Catholic Church and hierarchy, or whether, as the appellants contended, the church and land are appropriated to the purposes of a church united with and subject to the jurisdiction of the Pope and the authorities of the Roman Catholic church of the diocese in which the land and church are situated.

A history of the transactions and disputes is given in the judgment of their Lordships. It is directed to shew the purposes for which the trust in question in the suit was created.

Latchford, K.C., and *M. J. Gorman, K.C.*, for the appellants, contended that the evidence shewed that the beneficiaries of the trust created in this case were Greek Catholics, as that term was understood in Galicia; that they included the appellants, the respondents, and all whom they represented, but that after the constitution of the trust, and shortly before this action was brought, the respondents and their adherents ceased to be Greek Catholics and became members of the Russian Orthodox Church. The evidence also shewed that the land was selected, part of it consecrated, and the church built whilst the inhabitants continued to be Greek Catholics under Greek Catholic priests. The trustees accepted their trust in the matter of getting out logs, building, and holding the property as trustees for those who were Greek Catholics clearly so described in the documents of title

issued from the Land Office. No suggestion was made at the time that the beneficiaries were members of the Russian Orthodox Church. When the bishop assigned to the trustees that was understood by all parties to be the true position of the congregation and its trustees. The respondents were not entitled to impose on the appellants or the congregation the faith, the form of government, or a priest of the Russian Orthodox Church. The respondents have failed to shew that at the time of the creation of the trust its beneficiaries were or were intended to be full members of the Russian Orthodox Church, nor is that Church in any way to be identified with the Greek Catholic Church as known in Galicia, from which country all the residents at Star had come. On the contrary, the Greek Catholic Church as understood in Galicia is identical with the Uniate Church, which implies union with the Church of Rome so far as regards subjection to the Pope, and that was the Church which the settlers brought with them, and the religious system which they sought to establish and perpetuate.

Sir R. Finlay, K.C., *Short, K.C.*, and *Hamar Greenwood*, for the respondents, contended that the evidence shewed that the intention of the founders was that their church should be a Greek Orthodox Church, and that it should not be subject to the authority and control of any Roman Catholic authority, and the land and logs were granted by the Land Office and vested in the respondents expressly for the purposes of a Greek Orthodox church. The evidence shewed that while in Galicia, so far as the respondents and their priests and their co-religionists acknowledged the authority of the Pope, they were constrained to do so by the law in force in Galicia. That law proscribes the Greek Orthodox Church, while the respondents and those who agreed with them described their church as the Russian or Greek Orthodox Church, distinguishing it from the first days of their settlement from the Greek Catholic Church as understood in Galicia. The evidence shewed that on reaching Star they determined to throw off subjection to the Pope, no law any longer preventing their doing so. It was contended that the evidence shewed that since the creation of the trust and the erection of the church the respondents and the congregation had continued to

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manage their own affairs without any interference by the Roman Catholic bishop or any attempt by him to control their management. No evidence was given to shew that the congregation or any considerable part thereof had ever expressed any dissatisfaction with the conduct of the trustees, who had consistently maintained their attachment to the proscribed Orthodox Church and their antipathy to papal authority. There was abundant evidence that the settlers were equally determined. All the priests who ministered to the congregation took occasion to announce publicly that they were not subject to the Roman Catholic bishop.

Latchford, K.C., replied.

1907 *Dec.* 3.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. In this case, by a majority of three judges to two, the Supreme Court of Canada reversed the judgment of the Supreme Court of the North-West Territories. The Court, sitting in banco (Sifton C.J. dissenting), had affirmed a decision pronounced by the trial judge in favour of the plaintiffs. The plaintiffs are now the appellants.

The case is remarkable in more ways than one. In the course of the trial the leading counsel for the plaintiffs intimated to the Court that he elected to abandon the whole of the claim originally put forward on behalf of his clients, and announced that he had determined to take his stand on an alternative claim set up by amendment at the beginning of the trial. He explained that he did so "in order to shorten the trial." A sacrifice so unsparing and complete for an end so desirable seemed full of promise and hope. But the result can hardly be called satisfactory. The proceedings, lightened by throwing overboard the original cause of action, drifted on in an aimless and desultory way for more than a year. The trial itself occupied no less than thirty-three days. The hearing began on May 16, 1902. The evidence closed on September 4, 1903.

In the beginning of January, 1904, the learned judge filed his written judgment, which was afterwards embodied in a formal decree dated March 25, 1904.

The questions raised by the amendment, as well as those

raised by the original statement of claim, concern a congregation of Galician peasants recently settled in a district situated in the North-West Territories about fifty miles from Edmonton. The place is sometimes called Limestone Lake, sometimes Edna, but now more commonly Star. The congregation worships, or did worship until the services were stopped by the intervention of the police, in a church built of logs on a plot of land forty acres in extent, being legal sub-division 1 of s. 27 in township 56, range 19, west of the 4th meridian, Alberta.

This plot of land or legal sub-division is vested in fee simple in the three respondents on trust. There is a burial ground attached to the church. The rest of the land was intended to be used as a residence and homestead by the priest in charge.

The case made by the statement of claim was that the respondents had been removed from office, and that, although they were no longer trustees, they refused to hand over the trust property to the plaintiffs, who had been (it was alleged) duly appointed trustees in their place. Relief was asked on that footing, and on that footing only. No other claim was set up until just before the trial, when the plaintiffs obtained an order giving them leave to amend and to sue not only as trustees claiming a transfer of the trust property, but also as individuals "on behalf of themselves and all other members and adherents of the said congregation" in order to enforce their view of the trust both by declaration and injunction. Their Lordships think it is to be regretted that leave to make such a sweeping amendment should have been granted at that stage of the proceedings. The result has been an enormous waste of time and money, and an inquiry, or rather a series of rambling inquiries, on which the parties embarked apparently without much consideration, and certainly without any method. Even in their factum on appeal the plaintiffs, who were then respondents, propounded no less than eight issues, most of which seem to be wholly irrelevant. It is hardly surprising to find that after a trial so protracted, and with issues so confused, the learned judge of first instance should have failed to appreciate the real point of the case and the relative importance of the evidence before the Court. But it is somewhat remarkable that all the learned judges who supported his decision

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did so on the ground that the evidence was very conflicting, and that a judge who had seen the witnesses and heard what they said through the medium of an interpreter was more likely to be right than one who had not had the advantage or misfortune of such an experience.

Although there is a good deal of contradiction about irrelevant facts and immaterial details, there is absolutely no conflict on any material point. The difficulty, if there be a difficulty, is to determine the proper inferences to be drawn from facts which are either admitted or undisputed.

In order to succeed the appellants must shew that the trustees have committed, or are about to commit, some breach of trust. The questions, therefore, that lie on the threshold are, What was this trust? or in simpler language, What was the purpose for which the land was vested in the trustees? and When was the trust constituted?

There is no written declaration of trust. There are no formularies or articles subscribed by the persons who may be regarded as founders of this religious charity. Everything depends on oral testimony and on the meaning and effect of two documents issued by the land registry at the time when the Government made over the land as a free gift for religious purposes.

In Galicia, the province from which the settlers came, the great bulk of the population is divided pretty equally between Poles or Polaks, as they are sometimes called, and Ruthenians, or Little Russians. Held together by the strong hand of the Austrian Government, these two sections of the community have never become united or even assimilated. Strangers in race and in religion, they keep separate and aloof, each regarding the other with jealousy and dislike. "For many generations," says the Rev. Father Philas, a witness for the plaintiffs, who was a travelling missionary in Galicia and knows "the whole of it," "there has been a struggle between the Polish and the Little Russians, and the latter have been kept down." The Poles to a man are Roman Catholics. The Little Russians are, as Father Philas tells us, "devoted to the religion, rites, and ceremonies of the Greek Church." The Orthodox Greek religion

is proscribed in Galicia. For fear of Russian intrigues it is not tolerated there. Adherents of the Orthodox Church, as the Ruthenians or Little Russians originally were, are liable to be arrested and punished if they are suspected of an intention to revert to that faith. As a condition of being allowed to use their own liturgy and rites and to have their services conducted in the old Slavonic language, the Little Russians in Galicia are compelled to acknowledge the supremacy of the Pope and so to accept those points of doctrine which the Roman Church holds and the Greek Church rejects. In other countries and other provinces which, in course of time, have been detached from the Greek Empire and have fallen under the sway of devout Roman Catholic sovereigns something of the same sort has happened. The result has been the creation of a composite Church, half Roman and half Greek—Roman to the educated priesthood, but Greek to the ignorant peasantry. Its proper style is the "Uniate Church," a title derived from its enforced union with Rome.

The writer of an article on "The Greek Church" in Chambers' Encyclopædia sums up the position fairly enough. "It is difficult," he observes, "to state exactly to what degree union has been attained. The primary and, in most cases, the only condition was submission to papal supremacy, all else, clerical matrimony, communion in both kinds, Church discipline, rights and liturgy, being allowed to remain Greek."

The points of doctrine in which the Roman Catholic Church differs from the Greek Church appear, by a formal admission made in the action, to be:—

(1.) The infallibility and supremacy of the Pope;

(2.) The immaculate conception of the Virgin Mary;

(3.) Purgatory; and

(4.) The procession of the Holy Ghost from the Father and from the Son.

With these matters, other than papal supremacy, the settlers at Star, being uneducated peasants, unable, for the most part, to read or write or even to sign their own names, were not, it may be supposed, much troubled in their old country. Probably they never heard a word about any of them there. Galicia was no place for religious controversy or proselytism. Naturally they

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cared for none of these things. But there was one thing about which they did care, and that was subjection to the Pope. They were a frugal people and miserably poor. Some of them who came forward as witnesses for the defence complain of having had to pay a "big tax" to the Pope and of the exaction of money which was to be sent to Rome.

When these settlers came to Canada they found the conditions of life very different. They were free. They seem to have been intoxicated with their freedom. They had come to a land, says one of them, where there was "no must." They had escaped from their oppressors. But the past was not forgotten. At one of the services held in the early days in a schoolhouse before the church was built they were reminded by the officiating priest of the heavy yoke laid on them in their old country, and then the whole congregation burst into tears. They were an impressionable people, and not unlikely to be influenced in the choice of a religion, when free to choose for themselves, by sentiments of patriotism and the memory of past oppression.

Emigrants from Galicia began to settle in the North-West Territories about the year 1892. They were few in number at first. For some time they had no church—no priest to bury their dead, or perform the marriage service, or keep them in the straight path and guard adherents of the true faith against the dangerous and deadly errors of Christians of another denomination. By degrees the settlement increased. In 1896 there were about thirty Galician families in the neighbourhood of Star, P.O., scattered about in the surrounding country. Then some of the leading men among them resolved to take steps with the view of providing a place for religious worship and securing the services of a priest. Prominent among the leaders of the movement were the respondents and two or three others, who are witnesses in the case. The trial judge records an admission by the learned counsel for the plaintiffs to the effect that the three respondents were "among the most active members and liberal supporters of the church," and that "they and Fedor Melynk and Wasyl Feniak," who were called for the defence, "were among the first active workers in the congregation." Their object, and the object of all the early settlers at that time, appears to have been

to provide religious services in their new home identical in language and in form with those to which they had been accustomed in the old country, and at the same time to make themselves independent of the Pope and to break off from the Church of Rome, which seems to have been always associated in their minds with their enemies the Polaks or Poles. There was no idea then or at any other time of founding an independent sect. The choice lay between the Orthodox Church to which their forefathers belonged and the Uniate Church such as it was in Canada, where there is no Uniate bishop, and Roman Catholic prelates claim to be its rulers and masters under the Pope as supreme head. At one of the earliest meetings it was resolved to write a letter to the bishop of the Orthodox Church in America, whose seat was in San Francisco. The letter was written and sent. An answer came back. Then there was another letter to the bishop, and another reply from him. The letters to the bishop are, unfortunately, not in evidence; we have, however, the replies of the bishop, who signs himself "Nicholas, Bishop of Alutzk and Alaska." They are dated January 8 and February 5, 1897. In his first letter the Bishop thanks God that his correspondents "remember that" they "are Russians," and expresses an earnest desire to include them in "that blessed faith from which," he says, "Popes and Jesuits seek to separate you by force and falsehood." The bishop was evidently more than content with the reply he received. "I have much satisfaction," he writes, "in your return to your grandfathers' religion." He calls it "Pravoslavny," or orthodoxy. Then he promises to visit them, and speaks of the church which, he understood, they intended to erect. These letters were made public. They were read more than once at big meetings, at which, it is said, all the settlers in the neighbourhood were present. The arrival of letters from San Francisco, under the hand of his Eminence the bishop himself, must have been a great event. The news must have been carried to every homestead in the district telling of the affectionate interest the bishop took in the settlers and his intention to come and minister to them himself.

At Easter, 1897, the settlement was visited by a Uniate priest,

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Father Dymytrow. How it was that he came there nobody seems to know. He consecrated the Easter bread, and held services just as they were held in the old country. His visit lasted only a week, but he returned in the following September, and remained there then for about a fortnight.

In June, 1897, two Orthodox priests, sent by the Orthodox bishop in San Francisco, arrived at the settlement. They were Father Kamneff and Father Alexandroff. Father Alexandroff was apparently not in full orders at the time. But he always went about with Father Kamneff and acted as his assistant and interpreter. He was familiar with the language or dialect of the Little Russians. Father Kamneff and he held services, which were largely attended. When the services were over business was discussed; and the people crowded round them asking what they should do about a church. They assured their hearers to their great relief that the Government would give land without price for Church purposes and a permit to cut logs for church building. Then the question of site was considered. The settlers near Star wanted the church built there. Those who lived further east wanted to have it at a place now called Wostock, where some leading settlers named Nymyrski lived. It was about five or six miles from Star. Father Kamneff declared in favour of the Wostock site, and promised support to a church built there. He said they were too poor to build more than one church at that time, but they were not to quarrel about it; other churches could be built as the means of the settlers increased, and they would all be cared for by the missionaries of the Orthodox Church. The settlers about Star thought Wostock too far for them, and being comparatively well off, they determined to have a church of their own. They set about the work at once. They communicated with Mr. Oliver, M.P., and with the Land Department.

At a full meeting of the whole congregation, which had been, it is said, "well advertised," acting on an assurance or intimation received from headquarters, they selected the land which is in question in this action, and proceeded to cut logs for building.

It is important to observe that there was no difference of any sort between the settlers except on the question of site. So

entirely were they at one that the Nymyrskis and those who meant to belong to the Wostock congregation (which was beyond question intended to be Orthodox and was Orthodox from the first) came to the meeting held to select the site at Star. They did not subscribe for the church at Star because they were going to build a church of their own, but until that was built they meant to attend the church at Star, and so they all subscribed towards the expenses of getting the land. "They each," says Wasyl Feniak, "gave 30*c.* for that purpose at the time the meeting was called to select the land."

So far everything was going smoothly. There was no symptom of dissent; no murmur of dissatisfaction. The movement had originated with the people themselves. It was spontaneous and genuine. It was not started or worked by any priest or minister of religion.

When matters were in this position, the Right Rev. Emile J. Legal, coadjutor bishop of the Roman Catholic diocese of St. Albert, within which the Star settlement was locally situated, appeared on the scene. Father Dymytrow was there at the time, on his second visit. It was in September, 1897, or perhaps somewhat earlier, if the bishop's recollection is right.

Bishop Legal, who is spoken of generally as the "French bishop," held services in the settlement. One was conducted in Latin, and in accordance with the Latin rites; at another Father Dymytrow officiated, and the bishop gave the episcopal blessing, dressed, it is said, in full canonicals. He, too, was well received, and his services were well attended. He came to the settlement knowing that two Orthodox priests had been there before him. He was, of course, anxious that the people should not leave "his Church," as he calls it. He asked them why they were leaving their own Church. He told them that he wanted to do all he could for them. He told them he would try to secure the land "for them." He promised them "assistance towards building their church." He promised to supply nails, shingles, doors and windows—everything, in fact, that was required, except the logs, which they were to haul—if only they would stay in their own Church. Father Dymytrow, who was with the bishop and

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interpreted for him, advised the people to take everything they could get from the French bishop, but not to commit themselves by signing anything.

Bishop Legal's appeal seems to have produced but little impression. There were no visible signs of repentance. There was nothing to shew that the wandering flock had any thought of returning to the fold. Some of the people at Star bespoke the bishop's good offices with the Government; and there can be no doubt that the bishop was well received and listened to with respect. But that goes for very little. As Sifton C.J. says in a judgment which is concise and to the point, "Settlers in a remote district anywhere in this country, with no settled pastor of their own, will attend occasional religious services, and give the most serious attention thereto, without in any way believing that they are prejudicing their own religious views."

Bishop Legal left shortly after Father Dymytrow. Then the bishop, who had assured the people that he would do his best to secure the land "for them," applies to the Land Office, and gets the land vested in Bishop Grandin, the Roman Catholic bishop of the diocese, "in trust for the purposes of the congregation of the Greek Catholic church at Limestone Lake." It is not suggested that he had authority from the congregation or any member of the congregation to take this step. It is not suggested that he told the congregation or any member of the congregation what he was doing, or that he told the congregation or any member of the congregation what he had done when the matter was completed. He left the country for Europe some months afterwards without making any communication to the parties who were thus deprived of their land. The patent granted to Bishop Grandin is unfortunately not in evidence. But from what took place afterwards it is clear that it must have contained the declaration of trust which now appears on the register. Its date is not given anywhere. It must have been issued on or shortly after January 26, 1898, the date when Bishop Legal appears to have paid the patent fees for the land. How the bishop managed to carry the matter through does not appear. The practice of the Land Office requires that before a patent fee is accepted on an application

for a patent for a church a declaration must be made by the trustees, or some one on their behalf, "setting out the correct name of the church and the purposes of the trust." In the present case no such declaration was made or asked for in connection with the patent to Bishop Grandin. This omission is all the more remarkable because at the very time there was in the office a document declaring the names of the trustees for the Star congregation and the purposes of the trust reposed in them. While Bishop Legal's application was pending in the Land Office, the trustees were pressing the office for a regular permit to cut logs for their church. They had been supplied with an office form which the proper officer had headed thus: "I must know where the church is to be built, on what quarter section; and this requisition must be signed by the trustees for the church or by the priest in charge." The requisition was filled up accordingly. The position of the church on the land already selected by the congregation was defined. The requisition was signed and returned to the office. The date of return seems to have been December 7, 1897. As filled up by the trustees the requisition contains the following declaration: "This timber is required and will be used in the erection of a church building for the mission of the Greek Orthodox Church, and for no other purpose." It seems to their Lordships that sufficient weight has scarcely been given to this document, or rather to the permit which followed. The permit itself is not in evidence, but it was not disputed that a permit was issued in accordance with the requisition, declaring in the same words the purpose for which the timber was to be used. In form the permit was an authority to cut timber on Government land. But at the same time it was an invitation to the trustees to build a church on a specified plot of Government land, to be used for a specified purpose. When the permit was acted upon, the land in the hands of the Government became impressed with a trust for the purpose specified in the permit. It would be contrary to the elementary principles of equity to allow a private landowner who encourages another person to erect a building on his land to be used for a special purpose to make over the land to anybody else or to sanction the use of the building for a different purpose. A public department would no

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doubt act in accordance with the same principle, whether legally compellable to do so or not. It must not be forgotten that the Government was the author of the trust. The land was dedicated by the Government to the use of the mission of the Greek Orthodox Church. No doubt this was done at the instance of the trustees, and no doubt the Government would have dedicated the land just as readily to the use of the Roman Catholic Church if they had been asked to do so. But, in point of fact, by the permit they did dedicate it to the purposes of the Orthodox Church.

Some time after the issue of the patent to Bishop Grandin the congregation at Star discovered that the land which they had selected for themselves had been vested in the Roman Catholic bishop. They were naturally indignant. Father Tymkiewicz, a Uniate priest who came to Star in April, 1898, and was then in charge, disapproved of the action of Bishop Legal as much as any lay member of the congregation. "The congregation as such," says Spaczinski, one of the principal witnesses for the plaintiffs, "became unfriendly to Bishop Legal because he tried to take away the church land from them and have it in his name." The trustees were directed to take steps to recover their property. They went to Mr. Oliver, they went to the Land Department, they went to see the bishop. The bishop was absent, but they saw the bishop's representative, an elderly Roman Catholic priest. Father Tymkiewicz, as Spaczinski says, had told them "not to be under the control of the French bishop." Bishop Grandin's representative told them that they "had to be under the bishop." "The tail," he said, "cannot wag the cat, the head must be there to wag the tail." They answered him bluntly, "You are not our head and we are not your tail." They added that if the bishop would not give the land back they would go to a lawyer. The bishop made no more difficulty. He executed an assignment of the land to the trustees. The Land Department acted on the assignment. The land was transferred to the trustees, but the trust was left to stand as declared in words chosen apparently by Bishop Legal. That was another mistake. If the patent to Bishop Grandin had been revoked, as it ought to have been, the trust would no doubt have

been expressed in the same words as those used in the permit. The trustees were probably satisfied with their success in recovering the land, and paid little or no attention to the wording of the declaration of trust. No one certainly could have foreseen the vast extent of controversy to which those words have led. Ecclesiastics of all denominations—Uniate, Orthodox, Roman Catholic, Church of England, and Presbyterian—were called as witnesses to enlighten or perplex the Court. After all the result is that the words are acknowledged to be ambiguous and applicable to the Greek Orthodox Church as well as to the Uniate Church. Historically, at any rate, they are more properly applicable to the Orthodox Church. Father Zoldac, a witness for the plaintiffs, says: "From the time of the great schism in 1044 the Western Church was known as the Roman Catholic, and that of the East as the Greek Catholic."

So far their Lordships have been compelled to deal somewhat fully with the materials before them. Up to this point there is really no conflict in the evidence. There are only two witnesses on the side of the plaintiffs who were in the settlement about the time when the church was founded. One (Spaczinski), who did not come till March, 1897, contributed neither money nor labour, and admits that he was paid or promised payment for collecting the names of the adherents of the Orthodox Church after Father Kamneff's visit. He says that he got sixty names and then lost the list. The other (Petro Melnyk) professes never to have heard of the petition to the Orthodox bishop at San Francisco. The other witnesses on behalf of the plaintiffs are concerned about the meaning of the words "Greek Catholic," or speak of occurrences of a much later date which can have no bearing on the real question at issue. What is wanting in the meagre evidence offered by the appellants on the only material question in the case is supplied by the respondents, and it was neither challenged by cross-examination nor contradicted directly or indirectly.

The trust was now constituted. It was constituted when the permit was issued, or at latest when the Government parted with the land for the use and behoof of the congregation at Star. Is it possible to hold, as the trial judge has held, that a trust so

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constituted is a trust for a church "which is united with the Roman Catholic Church"?

The events which took place afterwards, though they occupy much space in the printed evidence, are of little or no importance. It is a matter of indifference what were the relative numbers of the opposing forces when the congregation became divided against itself in December, 1900, or what expressions were used in a letter written on behalf of the congregation in July of that year to a Uniate priest who was advertising for employment.

Father Tymkiewicz remained with the congregation at Star for about five or six months. He conducted the services just as the services had been conducted in Galicia, and the congregation seems to have been perfectly satisfied with his ministration. He was not more loyal to Bishop Legal than Father Dymytrow had been. But he was certainly more open and straightforward. He told the people to take nothing from the French bishop. If they did, he said, they would belong to the French bishop. The warning was not needed. Bishop Legal neither gave nor offered to give any contribution in money or in kind towards the completion of the church, though he seems to have kept in touch with some of the congregation and to have visited the settlement more than once after the trust property was recovered by the trustees. This conduct on the part of the bishop seems to shew that he, at least, was conscious that the congregation did not belong to him or to his Church or to the Uniate church of which he assumed to be the pastor and head in the diocese of Alberta or St. Albert. His promises of support, large and liberal as they were, were conditional on the congregation keeping to what he called his Church or their own Church. It is impossible to suppose that a person in the position occupied by the bishop would have failed to perform his promises if he had thought that the condition attached to them had been fulfilled by the congregation.

After Father Tymkiewicz left the congregation was without a priest until Father Zacklynski came in July, 1900. The dissensions began in his time. It is not clear whether they arose out of money disputes or in consequence of a suspicion that he wanted to carry the congregation over to Rome. The congregation was divided. Then the trustees intervened and

procured the services of Father Korchinsky, an Orthodox priest who had been connected with the Wostock congregation. Unfortunately they did so without consulting the congregation at Star; more unfortunately still, Korchinsky insisted on public renunciation of Romish doctrines; the quarrel broke out afresh, and the police were compelled to interfere and close the church.

Although the trustees would no doubt have done better if they had taken the congregation into their confidence, it is impossible to say that they have committed a breach of trust. The plaintiffs have wholly failed to prove their case. The decree of the trial judge was, in their Lordships' view, properly reversed.

The appellants laid much stress on the undoubted fact that the congregation gladly accepted the ministration of Uniate priests. But then it must be remembered that there were no Orthodox priests in Galicia, and that the Uniate priests who ministered to the congregation at Star were, or claimed to be, fellow-countrymen, and professed to regard with little favour the pretensions of the Roman Catholic bishop and his coadjutor. Besides, there was no difference between the services of the Orthodox Church and those of the Uniate Church intelligible to persons in the position of the parties to this lamentable quarrel, or, indeed, noticeable by them until they were armed and instructed on the point for the purpose of the conflict or for the purpose of the trial.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed.

The appellants will pay the costs of the appeal.

Solicitors for appellants: *Harrison & Powell.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

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McCONNELL . . . . . DEFENDANT;

AND

BEATTY AND ANOTHER . . . . . PLAINTIFFS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

R. S. O., 1887, *c.* 23, *ss.* 20, 26—*Sale of Land for Arrears of Taxes—Rights of Purchaser who has obtained a Certificate of Sale—R. S. O.*, 1887, *c.* 193, *s.* 184—*Prior Registration of Conveyance by defaulting Owner—Actual Purchase must be proved.*

Held that, according to the true construction of ss. 20 and 26 of R. S. O., 1887, c. 23, the purchaser at a Government sale of lands for arrears of taxes who has obtained a certificate of sale under s. 20 becomes the effective owner thereof if the defaulting owner does not redeem within one year, and is absolutely entitled to a conveyance under s. 26, notwithstanding that the certificate is in the possession of the defaulting owner.

Held, further, that the plaintiff, who claimed title under a conveyance from the defaulting owner registered prior to the purchaser's, obtained under s. 26, could not rely on an alleged redemption by him after the expiration of one year, but must in order to succeed prove a valid written transfer to him by the purchaser of the lands in suit.

The purchaser having failed to obtain and register his deed of conveyance under s. 20 within eighteen months after the sale:—

Held, that priority of registration by the plaintiff did not avail under R. S. O., c. 193, s. 184, sub-s. 1, applicable to the case by virtue of s. 31 of the said c. 23, in the absence of proof of his actual purchase.

APPEAL from a judgment of the Court of Appeal (December 26, 1906), reversing a judgment of Street J., the trial judge (December 11, 1905), which dismissed the action.

In that action the respondent J. W. Beatty sought, under the circumstances detailed in their Lordships' judgment, to cancel and set aside a tax deed of the lands in suit from the Treasurer of the province of Ontario to the defendant Bull, and to have this tax deed and a subsequent conveyance from Bull to the appellant removed from the registry office as a cloud upon the respondent's title. The other respondent was the Attorney-

Present: LORD ROBERTSON, LORD COLLINS, SIR ARTHUR WILSON, SIR HENRI ELZÉAR TASCHEREAU, and SIR ALFRED WILLS.

General for the province, added at the trial as a party on the relation of the plaintiff.

The tax deed was dated December 14, 1903. Bull's conveyance to the appellant was dated January 12, 1904. Both deeds were registered. The respondent claimed title under a prior registered conveyance to him by his brother, the defaulting owner, W. H. Beatty, impeaching the appellant's title on the grounds (1.) of an alleged purchase by W. H. Beatty of Bull's title acquired at the sale; (2.) of priority of registration of the respondent's conveyance, relying on s. 184 of R. S. O., c. 193.

The trial judge decided against the respondent on both contentions. He said as to the first: "I am unable to find in the evidence and exhibits before me any legal evidence of a contract of any kind between Bull and W. H. Beatty, or of any payment by Beatty to Bull of any consideration"; and, "there is nothing in writing between them, and there is no evidence even which I am at liberty to consider, that Beatty ever paid Bull any money."

As to the second ground he decided that the respondent was "only a volunteer," and was therefore not protected by the statutory provision cited.

This decision in favour of the appellants was overruled by the Court of Appeal. Osler J. said that the evidence justified the inference "that he, the defendant Bull, had agreed to be redeemed."

The Chief Justice said that at the date of the issue of the tax deed "Mr. Bull was not then the owner or holder of the certificates, and could not require the Treasurer to issue a deed of conveyance under the provisions of the statute"; and again, "the power of the provincial Treasurer in making a deed of conveyance to the purchaser is made by s. 26 to depend upon two things, the non-redemption of the lands and the continuance of ownership of the certificate by the purchaser. The deed can only convey to the purchaser or owner or holder of the certificate."

Hellmuth, K.C., and *J. H. Moss*, for the appellant, contended that he was a purchaser for value of the lands in suit with a registered title acquired without notice of the respondent's claim.

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The respondent had failed to prove any redemption by W. H. Beatty, and if he had it was inoperative, being after the expiration of twelve months from the tax sale. He had also failed to prove a purchase of Bull's title by W. H. Beatty by any valid evidence, or in any way which satisfied the Statute of Frauds. His possession of Bull's certificate did not affect Bull's right to a conveyance; nor had he proved that he himself was a purchaser from W. H. Beatty.

Blackstock, K.C., and *W. B. Brodrick*, for the respondents, contended that the evidence shewed that W. H. Beatty had redeemed the lands sold to Bull long prior to the issue of the tax deed, and in consequence Bull's rights under his purchase or as holder of the certificate were extinguished. Bull was neither the owner of the lands nor the holder of the certificate at the time the tax deed was executed. The tax deed was in the nature of a Crown grant, and there was no power vested in the provincial Treasury to convey the lands to any person other than the original holder of the certificate or his assigns. The respondent was the lawful holder thereof at the date of the tax deed to Bull. He was, moreover, a purchaser in good faith of the land in suit within the meaning of s. 184 of the Assessment Act. Under that section he was entitled to priority over the appellant, whose tax deed, under which his vendor derived title, had not been registered within eighteen months from the date of the tax sale.

Hellmuth, K.C., replied.

1907 *Dec.* 10.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. The controversy out of which this appeal arises relates to two parcels of mining land in the district of Algoma, Ontario.

In the year 1887 the lands in question were undoubtedly vested in fee simple in William H. Beatty. But in that year, the taxes payable upon the lands having fallen into arrear, the lands were put up for sale by the proper Government officer, in order to realize the arrears. A number of properties were sold at about the same time, under similar circumstances, the sales being held on November 11 and December 14, 1887. The lands

now in question were sold on December 14, and one Thomas H. Bull became the purchaser of these lands and of a large number of other lots.

The law governing the matter was the Act of 1887, Rev. Stat. Ontario, 1887, c. 23. Sects. 10 and 17 authorized and directed the sale, by the officer to whom the duty was assigned, of lands in Algoma and Thunder Bay, where the taxes due were in arrear for three years. The proceedings at and after the sale and their effect were prescribed by the subsequent sections:—

"20. The Treasurer, after selling any land for taxes, shall give a certificate under his hand to the purchaser, stating distinctly what part of the land has been sold, and describing the same, and also stating the quantity of land sold, the sum for which it has been sold, and the expenses of the sale, and further stating that a deed conveying the same to the purchaser or his assigns will be executed by the Treasurer on his or their demand, at any time after the expiration of one year from the date of the certificate, if the land be not previously redeemed.

"21. The purchaser shall, on receiving the Treasurer's certificate of sale, become the owner of the land, so far as to have all necessary rights of action and powers for protecting the same from spoliation or waste, until the expiration of the term during which the land may be redeemed; but he shall not knowingly permit any person to cut timber growing on the land or otherwise injure the land, nor shall he do so himself, but he may use the land without deteriorating its value.

"22. From the time of payment to the Treasurer of the full amount of the redemption money, required by this Act, the purchaser shall cease to have any further right in or to use the land in question."

"25. The owner of the land which may be sold for taxes, under the provisions of this Act, for non-payment of taxes thereon, or his heirs, executors, administrators or assigns, may at any time within one year from the day of sale (exclusive of that day) redeem the land sold by paying to the Treasurer, for the use and benefit of the purchaser or his legal representatives, the sum paid by him, together with ten per cent. thereon, and the Treasurer shall give the party paying such redemption

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money a receipt stating the sum paid, and the object of payment, and the receipt shall be evidence of redemption.

"26. If the land be not redeemed within the period so allowed for its redemption, being one year exclusive of the day of sale, as aforesaid, then on demand of the purchaser or his assigns, or other legal representatives, at any time afterwards, and on payment of $1 the Treasurer shall execute and deliver to him or them a deed of sale in duplicate of the land sold."

Bull duly received the certificates provided for by s. 20 in respect of all the lots purchased by him, including the two properties now in dispute. These were not redeemed under s. 25 within the year allowed for the purpose by that section. Bull appears subsequently to have sent these certificates with others to the Treasurer's office for the purpose of obtaining in exchange deeds of sale as directed by s. 26.

In 1889 an incident occurred, the details of which seem to have become forgotten by the parties concerned, until they came to light during the trial of the present case. So far as has been traced, the facts were the following.

On January 26, 1889, Bull wrote to the proper official in the Treasurer's office: "Please hand to Mr. T. D. Ledyard all my tax certificates relating to any part of s. 8 in 8th concession McTavish" (which included the lands in question). "I do not require any deeds of this land, as I have agreed to assign it, so please do not make them out." The reply on January 28 was: "The deeds already prepared embraced some of the sub-divisions of eight in 8th McTavish. However, upon receipt of $38 . . . . new deeds will be prepared by the authority of the Treasurer and the certificates referred to returned."

On January 31 Ledyard appears to have received the certificates referred to, for on that day he gave a receipt for them to the official in the Treasurer's office. Ledyard is a friend of Bull, and was acting for him, if for anybody. Ledyard appears to have made over the certificates in question to Leys, a barrister of Toronto, in an envelope addressed originally in Ledyard's handwriting to "John Leys, Esq., M.P.P.," but of which the address was altered in the handwriting of Leys, by striking out the direction to Leys and writing below, "W. H. Beatty, Esq." It

has been held, and their Lordships accept the finding, that Leys acted for W. H. Beatty in obtaining these certificates from Ledyard, or from Bull through Ledyard, and that Beatty paid some money to Leys. After 1889 or 1890 the certificates remained in Beatty's possession with the title deeds of the properties.

By a deed bearing date October 29, 1903, W. H. Beatty purported to convey the properties in question to his brother Joseph Walker Beatty, the now respondent. The nature of that conveyance will have to be considered later. That deed was registered on November 6, 1903.

On December 14, 1903, the Treasurer executed a deed of sale, including the properties in question, in favour of Bull, purporting to do so in pursuance of the tax sale of December 14, 1887, and on January 12, 1904, Bull conveyed the lands in question to McConnell, the present appellant. The sale deed to Bull was registered on December 18, 1903, and the conveyance to McConnell on January 14, 1904.

The present suit was instituted on July 13, 1904. The plaintiff was Joseph Walker Beatty, with whom was afterwards joined the Attorney-General for Ontario, on the relation of Joseph Walker Beatty. The defendants were McConnell, Bull, and one Gregory.

The statement of claim set out Beatty's title. It alleged that Bull's tax deed of December 14, 1903, had been obtained by the defendants by misrepresentation and suppression of facts, such as to amount to a fraud upon the Crown; and it prayed that the tax deed should be cancelled and set aside, and that the registration of that deed, and of the grant by Bull to McConnell, should be removed from the registry office as a cloud on the plaintiff's title. Other relief was also asked for.

The charges of fraud, misrepresentation, and suppression of facts have failed, and the suit has been finally dismissed, so far as it affects Bull and Gregory, who are no parties to this appeal. The question that remains is whether, on the facts established at the trial, the plaintiff has shewn good title in himself as against McConnell.

Street J., who tried the case, held that Beatty had shewn no

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title to any relief. The Court of Appeal, however, reversed that decision, and granted to him, as against McConnell, substantially the relief asked for; hence the present appeal.

As to the effect of the Act of 1887 there appears to their Lordships to be no doubt. The purchaser at a tax sale, on obtaining his certificate under s. 20, becomes by s. 21 the owner of the land for certain limited purposes. The original owner has, by s. 25, a year within which to redeem. But if he does not redeem within that year his right of ownership is gone, and the only effective ownership that remains is that of the purchaser, who, under s. 26, has an absolute right at any time afterwards to claim a deed of sale from the Treasurer, and so to perfect his title.

As to the principal question discussed on the argument of the appeal, their Lordships agree with the trial judge where he says: "If Beatty was not entitled to a conveyance from Bull, then Bull was entitled to obtain his conveyance from the Crown"; and if Beatty was so entitled as against Bull, it must be by virtue of some transaction, duly effected according to law, by which either Beatty's original title was recovered and re-established, or else a new title was acquired by contract from Bull.

The case was argued upon both these grounds. It was first contended that what happened in 1889 amounted to a redemption of the properties within the meaning of the Act, and so rehabilitated the title of Beatty as it existed before the sale.

Their Lordships are of opinion that, assuming the correctness of all the inferences which have been drawn from the few facts actually proved, there is still no room for the application to the case of any doctrine of redemption. The power to redeem given by the Act was limited to the term of twelve months. After that period had elapsed, Beatty was a stranger to the land, and had nothing to redeem. Bull's right was not of the nature of an incumbrance upon, or limitation of, Beatty's former title; it was an adverse title superseding Beatty's altogether.

It was argued, secondly, that what occurred in 1889 amounted to a contractual transfer by Bull to Beatty of the rights which the former had acquired by virtue of the sale and of the certificates issued to him. And if Beatty's right can be supported at all, it must, in their Lordships' opinion, be upon this ground.

But there is a fatal difficulty in the way. The interest supposed to have been dealt with was clearly an interest in land, and under the Statute of Frauds the supposed transaction required to be evidenced in writing; whereas not only has no such writing been produced, but there is no ground for supposing that anything of the kind ever existed.

For the foregoing reasons their Lordships are of opinion that the alleged title of W. H. Beatty as against Bull, and therefore the title of J. W. Beatty, so far as depends upon the devolution of that of his brother, has not been established.

Another question remains to be considered. Sect. 31 of the Act already referred to incorporates several sections of the Assessment Act, Rev. Stat. Ont., c. 193, and applies them to sales by the Treasurer. Of these s. 183 prescribes the form of the sale deed.

Sect. 184, sub-s. 1, says that "The deed shall be registered in the registry office of the registry division in which the lands are situate, within eighteen months after the sale, otherwise the parties claiming under the sale shall not be deemed to have preserved their priority as against a purchaser in good faith who has registered his deed prior to the registration of the deed from the warden and Treasurer."

The sale deed to Bull was not registered, nor indeed executed, for years after the sale to him, and Beatty's conveyance to his brother was registered before Bull's deed. It was contended that J. W. Beatty was a purchaser in good faith from his brother, and was, therefore, protected by the section just cited against Bull and any one claiming through Bull. If he was a purchaser, there is no question of his good faith.

Street J., the trial judge, decided against this contention, while some of the learned judges on appeal expressed an opinion in favour of it. It is, therefore, necessary that their Lordships should express their opinion.

The evidence as to the circumstances of the conveyance by the one brother to the other is neither full nor clear. But it is certain that at that time there was outstanding an option of purchase granted by W. H. Beatty in favour of one Langworthy at a price of $7560, an option which was ultimately abandoned, and that

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J. W. Beatty gave to his brother a promissory note for $7560, and the brother indorsed this note on to his wife, giving her at the same time a letter, dated November 25, 1903, which ran :—

"Toronto, November 25, 1903.

"My dear Charlotte,—I asked you some days ago to be a guarantee for an amount of $50,000 I owed George Gooderham, and agreed to secure you against any loss on that, as well as for some $4000 or $5000 I now owe you, some $6000 or $7000 that I require in addition, and as security therefor I hand you J. W. Beatty's note for $7560.00 connected with a land deal in the township of McTavish, Thunder Bay, and also assign to you an account of some $6000 to be paid to me by Louise and Jim which is payable when Jim comes of age, and in consideration of this advance, as well as the guarantee you are giving for me, I hereby agree to execute a mortgage to secure you for all the above in such form as may be necessary under the laws of the province of Quebec to properly charge my one-third interest in a property at Verdun, being No. 4679 on official plan and book of reference for the parish of Montreal, containing 68-41 arpents lying between the Lower Lachine Road and the aqueduct and 42, 58 arpents lying between the aqueduct and cadastre or plan No. 3912.

"I enclose you a copy of the agreement entered into between yourself, George Gooderham, and myself extending the payment of that $50,000 for ten years, $5000 payable each year. You cannot be called upon to pay any part of this $50,000 until Mr. Gooderham has exhausted my estate, which I trust is good enough for it any way. And I further agree that any time you demand it I will transfer and assign to you my claim against the estate of T. F. Worts as further security for all the above.

"Yours,

"W. H. Beatty."

The claim of J. W. Beatty to be regarded as a purchaser has been put at different times in two different ways. It has been said that he was a purchaser in his own right, by reason of the promissory note which he gave to his brother. But the trial judge found that it was never intended that that note should be

paid, and that it was, in fact, destroyed when Langworthy's option was abandoned. Those conclusions do not seem to have been dissented from, nor could they on the evidence well be questioned. And they are sufficient to shew that J. W. Beatty was a volunteer, and in no sense a purchaser, so far as his personal interest was concerned.

It has been contended, secondly, that J. W. Beatty was a purchaser as trustee for his brother's wife, that he took the property for her benefit to secure her against loss on the guarantee for her husband mentioned in his letter of November 25, 1903. The conveyance itself contains no declaration of trust, and, if trust there be, it must be looked for in the letter of November 25. But that letter, while it refers to the wife's guarantee, and to the brother's promissory note indorsed over to her, and while it expressly charges or promises to charge certain properties as security against the guarantee, contains no words purporting to charge the properties now in question. The contention, therefore, that J. W. Beatty was a purchaser, as trustee for his brother's wife, appears to their Lordships to fail.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the judgment of the Court of Appeal should be discharged, with costs to be paid by the respondent Beatty, and the judgment of Street J. restored. The respondent Beatty will pay the costs of this appeal.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Charles Russell & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1908 Jan. 22.

SPEYER BROTHERS . . . . . Appellants;

AND

COMMISSIONERS OF INLAND REVENUE . Respondents.

Revenue—Stamp—Treasury Note of Foreign Government—Promissory Note or Marketable Security—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 33, 82, 122.

Where a document comes within each of two categories chargeable with duty under the Stamp Act, 1891, the Crown is entitled to only one of the duties, but it may choose the higher.

The United States of Mexico issued "gold coupon treasury notes" with a promise to pay principal and interest to bearer at fixed dates either abroad or, at the option of the holder, in London. There was evidence that the notes were saleable on the London and other Stock Exchanges:—

Held, that the notes being in fact both promissory notes and marketable securities within the Stamp Act, 1891, they were liable to the higher duty imposed by that Act upon marketable securities.

Decision of the Court of Appeal, [1907] 1 K. B. 246, affirmed.

The form of the notes in question is given in full in the report in the Court of Appeal. Walton J. held that they were assessable only to the duty imposed by the Stamp Act, 1891, upon promissory notes. (1) The Court of Appeal (Collins M.R., Cozens-Hardy and Farwell L.JJ.) held that they were assessable to the higher duty imposed upon marketable securities. Hence this appeal.

Jan. 20, 22. *Danckwerts, K.C.*, and *Vaughan Hawkins*, for the appellants. This instrument is a promissory note, and nothing more. Its essence is the acknowledgment of indebtedness and the promise to pay. Similar instruments have been so held: *In re General Estates Co.* (2); *In re Imperial Land Co. of Marseilles* (3); *Rothschild* v. *Inland Revenue Commissioners.* (4) In *Mortgage Insurance Corporation* v. *Inland Revenue Commissioners* (5) Lord Esher M.R. states in detail the qualities or incidents which attach to a promissory note, all of which are

(1) [1906] 1 K. B. 318.
(2) (1868) L. R. 3 Ch. 758.
(3) (1871) L. R. 11 Eq. 478.
(4) [1894] 2 Q. B. 142.
(5) (1888) 21 Q. B. D. 352.

found in the present case. There must be a defined sum of money, though it may be payable "out of a particular fund or upon a contingency." He excludes the case where, in addition to the sum certain, there will be "an undefined sum to be paid." This instrument does not come within that exclusion. In *Brown, Shipley & Co.* v. *Inland Revenue Commissioners* (1), which Walton J. distinguished, there was an hypothecation, which there is not here. *Edmonds* v. *Blaina Furnaces Co.* (2) was a case of a debenture in the ordinary sense charging the whole undertaking, and is therefore inapplicable. The statute says that a "Promissory note of any kind whatsoever" is to be taxed according to the schedule. As soon as the document is shewn to be a promissory note, the schedule applies. An instrument may come under two categories, and the need or amount of stamp be decided according to the purpose in hand: *Matheson* v. *Ross.* (3) The Court of Appeal have acted on the assumption that where a document is taxable under either of two heads the Crown has an option. The categories of taxation are mutually exclusive, and the Crown has no such option. The income tax cases, e.g., *Gresham Life Assurance Society* v. *Styles* (4), proceed on the assumption that the rules and cases are exclusive of each other, and that there is no overlapping. This instrument is not a "marketable security." There is no definition in the Act of the word "security," though there is a definition of "marketable security." This instrument is not a security, not marketable, not a debenture, but simply a commercial negotiable promissory note within the meaning of the Bills of Exchange Act, 1882—"an unconditional promise . . . . to pay on demand, or at a fixed or determinable future time, a sum certain in money."

Sir W. S. Robson, S.-G., and *Sir Robert Finlay, K.C.* (*William Finlay* with them), for the respondents. The question is, first, whether this instrument is a security, and, secondly, whether it is marketable. It is certainly a security. The term does not necessarily involve hypothecation; there may be a personal security. The language of the First Schedule is "Bond, covenant

(1) [1895] 2 Q. B. 598.
(2) (1887) 36 Ch. D. 215.
(3) (1849) 2 H. L. C. 286.
(4 [1892] A. C. 309.

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or instrument of any kind whatsoever, (1.) being the only or principal or primary security, &c." A security is marketable when it is "transferable by delivery and bearing date or signed or offered for subscription." In s. 122 a marketable security is described as "a security of such a description as to be capable of being sold in any stock market in the United Kingdom." Clearly these "gold coupon treasury notes" payable to bearer are in their nature saleable. The Act undoubtedly treats promissory notes as "securities," otherwise the 11th exemption in the schedule, under "Bill of Exchange and Promissory Note," of "any coupon or warrant for interest attached to and issued with any security," would be a nullity, and each coupon would require to be stamped. The reasoning of Collins M.R. below is conclusive—when once you get a clear finding of fact that this instrument is a marketable security being a promissory note, you get the two things that are essentially combined. You get an instrument, and you get a security, and you get it marketable. The case is exactly similar to *British India Steam Navigation Co.* v. *Inland Revenue Commissioners.* (1) There is no foundation for the contention that categories or classes enumerated in an Act of Parliament must be regarded as mutually exclusive. In *British India Steam Navigation Co.* v. *Inland Revenue Commissioners* (1) the instrument was treated by the judges as being both a debenture and a promissory note. No business man would describe this instrument as a promissory note. It would more naturally be described as a foreign Government security.

Danckwerts, K.C., in reply. This instrument is a promissory note within the Bills of Exchange Act, and nothing more. It is perfectly competent for a foreign Government to issue promissory notes. To bring the document under any other head of taxation it must be shewn that it is a promissory note plus something else. There is nothing here except an acknowledgment of debt and an undertaking to pay interest. The Crown has no option in the matter; it is for the Court alone to decide under what head an instrument is to be stamped.

(1) (1881) 7 Q. B. D. 165; see per Grove J., at p. 169, and per Lindley J., at pp. 171-2.

LORD LOREBURN L.C. My Lords, I think the appeal fails. We are told, I have no doubt quite accurately, that the case is one of great importance, but it is not either long or difficult.

The question is under what description a particular document is to be stamped. Mr. Danckwerts and Mr. Vaughan Hawkins say that the document is a promissory note within the Act of 1891, and I think it does fall within the definition of a promissory note in that Act. They also say that it is so in a commercial sense within the meaning of the Bills of Exchange Act. I do not desire to express either assent to or dissent from that proposition, because I do not think it really signifies in the decision of this case.

Then comes the question, Is this document also a marketable security within the meaning of the Act? That was so found by the Commissioners, and so found by Walton J. after hearing evidence which has not been printed in the case before your Lordships. It seems to have been admitted in the Court of Appeal that it was a marketable security, and in one sense it has not been disputed here. I think it is a marketable security within the meaning of the Stamp Act, 1891. Accordingly, if that be so, the document will fall within the description both of a promissory note and of a marketable security.

Mr. Danckwerts, however, says further that, according to authority, a discrimination must be made for revenue purposes between marketable security and promissory note, and that the test whether a document comes within one class or another is this, Is it something more than a promissory note? Now in my opinion this document is something more than a promissory note. There is a greater excess over a promissory note, so to speak, in this case than there was in the case of the *British India Steam Navigation Co.* v. *Inland Revenue Commissioners* (1), which has been quoted to your Lordships. But in my view the document falls within both descriptions, and where a document is by its description chargeable under the Stamp Act as a promissory note, and is also chargeable under

(1) 7 Q. B. D. 165.

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the statute as a marketable security, the Crown has a choice whether to charge it under the one or under the other description. If the Crown does claim that the document shall be stamped at the higher rate within one part of the Act, it is no answer to say that there is another part of the Act under which the same document might be charged at a lower rate. It can only be charged once.

For that reason, in my opinion, this appeal fails and ought to be dismissed with costs.

LORD MACNAGHTEN. My Lords, I entirely agree.

LORD ROBERTSON. My Lords, if the plain man conversant with business were asked to describe this instrument, I think he would call it a foreign Government security. It is found as matter of fact that the thing is marketable. It is therefore a marketable security.

Now it is true that from the point of view of legal analysis it contains a promise to pay, and is therefore in legal phraseology a promissory note. The result is that the instrument falls within both of the categories in this taxing Act. There is nothing legally impossible in this; it often occurs, and the result is that it may be assessed under either class at the option of the Government.

LORD ATKINSON. My Lords, I concur.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, January 22, 1908.

Solicitors: *Bircham & Co.; Sir Francis Gore, Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

COHEN . . . . . APPELLANT;

AND

BAYLEY-WORTHINGTON AND ANOTHER . . RESPONDENTS.

H. L. (E.) 1908 Jan. 30.

Settlement—Estate Tail—Disentailing Assurance—Protector—Three Persons appointed by Settlor—Death of Two—Power to appoint new Protector—Power not exercised—Power of surviving Protector—Fines and Recoveries Act, 1833 (3 & 4 *Will.* 4, *c.* 74), *ss.* 22, 32.

Three protectors of a settlement were appointed by the settlor under the Fines and Recoveries Act, 1833, with a provision for filling up vacancies. Two of the protectors died, and the vacancies were not filled up:—

Held that, since, upon the true construction of the settlement, it was not clear that the settlor intended to exclude survivorship, the surviving protector had power to exercise the office and to give a good title, the decision in *Bell* v. *Holtby*, (1873) L. R. 15 Eq. 178, having been followed for so many years.

Decision of the Court of Appeal, [1908] 1 Ch. 26, affirmed.

A TESTATOR, by will made in 1851, settled real estates in strict entail, and appointed three protectors of the settlement under the Fines and Recoveries Act, 1833, with power in the event of vacancies to appoint new protectors, "to the intent that the full number of three persons should from time to time fill the office." Two of the protectors died, and their vacancies were not filled up. The surviving protector exercised the office of protector, and consented to a disentailing assurance barring the entail. The estates having been sold, and the purchaser having objected to the title, Neville J. held that a good title had not been shewn, being of opinion that the settlor had expressed the intention that the office of protector should be exercised by three persons only. This decision was reversed by the Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.). Hence this appeal. The terms of the settlement are set out in full in the report of the latter decision.

P. O. Lawrence, K.C., and *Jenkins, K.C.* (*Nuttall* with them), for the appellant. On the natural construction of s. 32 of the

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Fines and Recoveries Act, when the office of protector is conferred on a group of persons the office does not survive on the death of one or more of the named persons. The Court of Appeal adopted the decision of Malins V.-C. in *Bell* v. *Holtby*. (1) But in that case there was no provision for appointing successors. Moreover, the words of s. 32 by implication negative the idea of survivorship of the protectorship which it is intended "to perpetuate . . . . in any one person or number of persons in esse." The office of protector carries with it a mere power, not coupled with an interest, and such a power cannot be exercised by survivors: Sugden on Powers, 8th ed. p. 252, s. 8; p. 259, s. 24; Farwell on Powers, 2nd ed. p. 140, 454. Malins V.-C. overlooked s. 33, by which the Court of Chancery is to be the ultimate protector. The only person to appoint a protector in the case of the death or relinquishment of office is the donee of the power: s. 32; thus survivorship is excluded. This is the view accepted by the text-writers: see Hayes' Conveyancing, 1840 ed.; and no statement in any text-book can be found in contradiction. Malins V.-C. relied on *Eyre* v. *Countess of Shaftesbury* (2); but that was a case of guardianship, and is therefore wholly inapplicable. In *Duke of Beaufort* v. *Berty* (3) Lord Macclesfield spoke of guardians as mere trustees. *Houell* v. *Barnes* was a case of executors (4); so *Mathew* v. *Brise*. (5) In *Curle's Case* (6) the grant itself of the office of auditor of the Court of Wards was to two persons and the survivor. The very purpose of the settlor here is to make alienation as difficult as possible. The circumstances of this case are extremely unlikely to recur or titles to be disturbed. The principle, therefore, that the Court will not disturb a decision of long standing—expressed by Lord Mansfield in *Hodgson* v. *Ambrose* (7), and recently in this House in *Morgan* v. *Fear* (8)—has no force. There is no general practice or usual form involved—only an extremely exceptional clause in a deed. [They also cited *Atwaters* v. *Birt* (9); *Warburton* v. *Sandys* (10);

(1) L. R. 15 Eq. 178.
(2) (1722) 2 P. Wms. 102.
(3) (1721) 1 P. Wms. 703.
(4) (10 Car. I.) Cro. Car. 382.
(5) (1851) 14 Beav. 341.
(6) (7 Jac. I.) 11 Rep. 2b.
(7) (1780) 1 Doug. 337, at p. 340.
(8) [1907] A. C. 425.
(9) (43 & 44 Eliz.) Cro. Eliz. 856.
(10) (1845) 14 Sim. 622

Clarke v. *Chamberlin* (1); *In re Wainewright* (2); *Page* v. *Midland Ry. Co.* (3)]

Upjohn, K.C., *Peterson, K.C.*, and *Underhill*, for the respondents, were not heard.

LORD LOREBURN, L.C. My Lords, if the question of law which arises in this case were open for our consideration, while I should be inclined to agree in the view expressed by Malins V.-C., I would certainly ask that it should be argued on the other side. But the fact is that thirty-five years ago Malins V.-C. did decide that where two persons were appointed protector, with no provision for appointing successors and no reference to survivorship, the consent of the survivor enabled the tenant in tail to bar the entail.

Now I am not prepared to depart from a rule laid down so long ago which has never since been questioned, and upon the faith of which I know not how many titles may rest.

Is there anything in the will to forbid the rule being acted upon in the present case? I can find nothing beyond this, that power is given to fill up the number of the group constituting the protector to three and a desire that it shall be so. To my mind that is not sufficient. If survivorship was to be excluded it ought to have been done with sufficient clearness. I think it has not been done with sufficient clearness, and therefore this appeal must be dismissed.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I agree with the judgment of Cozens-Hardy M.R., and I desire to adopt it with one slight reservation as to what is said about the last proviso in s. 32. The Master of the Rolls says that in his opinion that proviso "applies whether the tenant for life is or is not included in the persons appointed protectors." It seems to me that it only applies when the tenant for life, or the person who is described as the natural protector, is included in that body. I think the proviso is introduced ex abundanti cautela. When the natural protector himself is made one of

(1) (1880) 16 Ch. D. 176. (2) (1843) 1 Ph. 258.
(3) [1894] 1 Ch. 11.

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a body intended to displace and exclude the natural protector and when that body is reduced to one, and that one is the natural protector, it might have been open to argument, in the absence of such a proviso, that he ought not to act alone.

LORD ROBERTSON. My Lords, I agree with what has been said by my noble and learned friend on the woolsack.

LORD ATKINSON. My Lords, I agree.

LORD COLLINS. My Lords, I am of the same opinion.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, January 30, 1908.

Solicitors: *Sharpe, Parker & Co., for North, Kirk & Co., Liverpool; Woodcock Ryland & Parker, for Brooks, Marshall & Hall, Manchester.*

[HOUSE OF LORDS.]

GREAT WESTERN RAILWAY COMPANY . APPELLANTS; H. L. (E.) 1908

AND

PHILLIPS & CO., LIMITED . . . . . RESPONDENTS. *Feb.* 4.

Railway—Regulation—Provisional Order—Demurrage of Trucks—Arbitration—Right of Action for Damages for Detention—Jurisdiction—Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 *Vict. c. ccxxii.*), *s.* 6.

A railway Act confirming a provisional order, after providing that when merchandise is conveyed in trucks not belonging to the company the trader shall be entitled to recover from the company a reasonable sum "by way of demurrage" for any detention of his trucks beyond a reasonable period, enacted that any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party:—

Held, that a claim by a trader for damages caused by undue detention of his truck and cost of hire of another in lieu thereof was a difference arising under that section, and could be determined only by an arbitrator appointed under the Act.

Decisions of the King's Bench Division, *Ex parte Phillips & Co.*, [1906] 2 K. B. 426, and of the Court of Appeal, [1907] 2 K. B. 664, reversed, and decision of the county court judge restored.

THE facts arising in this appeal are stated in the judgments of Lord Loreburn L.C. and Lord Macnaghten. The county court judge held that the arbitrator alone had jurisdiction to determine the claim, and dismissed the action brought in his Court. That decision was reversed by Lord Alverstone C.J., Darling and Channell JJ. in the King's Bench Division, and their Lordships' decision was affirmed by Vaughan Williams and Buckley L.JJ. (Fletcher Moulton L.J. dissenting) in the Court of Appeal. Hence this appeal.

1907. Nov. 11, 13. *Cripps, K.C.*, and *Lush, K.C.* (*Schiller* with them), for the appellants. By the company's special Act every question arising under ss. 5 and 6 is to be referred to arbitration, and the jurisdiction of the ordinary Courts is excluded. Sect. 5 confers certain rights on the company; s. 6 gives certain rights to the trader. In each case any difference arising "shall be determined by an arbitrator to be appointed by

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the Board of Trade." This House held that such a legislative agreement was binding and enforceable in *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.* (1) Any difference of any kind must be so referred: per A. L. Smith L.J., *London and North Western Ry. Co.* v. *Donellan.* (2) As Lord Macnaghten remarked in *Midland Ry. Co.* v. *Loseby and Carnley* (3), no wider words can be imagined—any difference must be "finally determined" by the arbitrator. And see per Bigham J. in *Charrington, Sells, Dale & Co.* v. *London and North Western Ry. Co.* (4), where the charge was fixed at 6*d.* a day for "demurrage" or detention. The term "demurrage" is borrowed from the language of charterparties, but is not always in the form of a liquidated sum; it includes all claims for detention: *Sanguinetti* v. *Pacific Steam Navigation Co.* (5)

S. T. Evans, K.C., and *Bailhache*, for the respondents. Lord Macnaghten only meant that, when once matters go to arbitration, the arbitrator's powers must not be unduly narrowed. This is a claim for special damages, which can only be awarded by a Court. Here there was admittedly a tort. The words "by way of demurrage" exclude special damage. In *Donellan's Case* (2) A. L. Smith L.J. was not dealing with any such question. What the respondents claim is special damages, consisting in the loss of the earnings of the truck and the hire of another. With such a question the Courts can alone deal, and the respondents have not been deprived of their common law right of recourse to the ordinary tribunals. Sect. 6 provides an additional remedy, and does not substitute one remedy for another. The respondents claimed as damages the cost of providing another truck; those damages can be recovered, and in the case of a ship the cost of the substitution was allowed in *The Argentino.* (6)

Lush, K.C., in reply.

The House took time for consideration.

1908. Feb. 4. LORD LOREBURN L.C. My Lords, in this case there was a difference of opinion in the Court of Appeal.

(1) (1874) L. R. 2 H. L. Sc. 347.
(2) [1898] 2 Q. B. 7.
(3) [1899] A. C. 133, 137.
(4) [1905] 2 K. B. 437.
(5) (1877) 2 Q. B. D. 238.
(6) (1889) 14 App. Cas. 519.

The Great Western Railway Act, 1891, by its 6th section, makes provision for the case of detention by the company of trucks belonging to traders as follows: "Where merchandise is conveyed in trucks not belonging to the company, the trader shall be entitled to recover from the company a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable period, either by the company or by any other company over whose railway the trucks have been conveyed under a through rate or contract. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party."

The question before your Lordships is whether a difference that has arisen between the company and Messrs. Phillips & Co., Limited, comes within that section. If so, admittedly the jurisdiction of county courts is ousted. If, on the other hand, the difference is not within the section, then this action, brought in a county court, may proceed.

The action was brought in the Marylebone County Court to recover the sum of 8*s*. 8*d*. "for damages occasioned to plaintiffs" (Messrs. Phillips & Co., Limited) "by undue detention of their wagon and cost of hire of another wagon in place thereof."

Messrs. Phillips had sent on the company's line a truck of their own which was delayed for a few days on its way to Wales, and say they had to pay 8*s*. 8*d*. for the hire of another truck to take its place. This sum the railway company refused to pay, and offered 6*d*. a day instead, which represented the earning power of the truck per day less depreciation.

Thus the question really narrows itself to this: Does the Act mean that an arbitrator shall decide what damages (general, special, or of any kind) must be paid by the railway company for the detention of a trader's truck? Or does it mean that he can only determine the net earning power of the truck to its owner and award that? In the end I thought the respondents' arguments virtually amounted to maintaining the latter contention.

Before scanning the actual words of the section itself, two considerations ought to be noticed.

The first is that this same Act deals also with the kindred case of a trader detaining a railway truck. When this occurs it is

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clear, upon the authority of *London and North Western Ry. Co.* v. *Donellan* (1), that under s. 5 an arbitrator alone can determine any difference, and has power to award such sum as he thinks fit, if the case is one of difference within s. 5. It may be, of course, that Parliament has prescribed a different course where the truck detained is that of the trader, though no reason for such a distinction can be suggested.

The second consideration is that if the true construction of this Act be that an arbitrator has not jurisdiction to determine a claim like the present, very great inconvenience and the concurrence of two jurisdictions (difficult to separate by any clear line) in determining the consequences of one and the same act follow inevitably. A hundred trucks are detained by the railway company, and, I will suppose, notice given to the company that they are required by the trader who owns them to carry out a contract he has made. The company detains them an unreasonable time, and causes special damage to their owner. Upon this the owner claims (rightly or wrongly) that he shall be indemnified from his loss. "No," says Mr. Evans, "that is a claim for damages and must be tried by a Court of Law. All that the arbitrator can entertain is a claim for a sum in the nature of demurrage, that is to say, a fixed sum per day for what in the ordinary course the truck would earn day in and day out during its life." Can the trader in that case bring both an action and a claim for arbitration so as to recover in both? If not, what is the precise distinction by which he must be guided in selecting the right tribunal? I do not know, and I have not been able to discover, a convincing answer to either question, after hearing an able argument. Yet these difficulties surely must make your Lordships cautious in accepting a construction which leads directly towards them.

But it may be these considerations cannot be entertained in face of the precise language of the statute, which must prevail. Accordingly I turn now to the precise words of s. 6. The arbitrator is to determine "any difference arising under this section," and the section entitles the trader to recover from the company "a reasonable sum by way of demurrage for any detention

(1) [1898] 2 Q. B. 7.

of his trucks beyond a reasonable period." Now, if it were not for the reference to demurrage, it could hardly be denied that the words "a reasonable sum for any detention" (of the trucks, be it noted) would include whatever damages were appropriate to the case. I cannot think that any other meaning is intended. What is demurrage? Primarily it is a term applicable to shipping and originally meant, in strictness, the money payable to the shipowner for detaining his vessel during certain days, usually at a fixed rate. It cannot mean that here, nor need we search for its extended meaning in shipping contracts, for it is very properly not argued that shipping terminology applies at all. In truth the word has no conventional meaning such as attaches to a term of art. I have had the advantage of reading in print Lord Macnaghten's opinion, and I agree in the interpretation which he places on this clause. Special damage is not excluded. I cannot agree with the argument that these words limit the sum recoverable to a fixed rate per day in the nature of rent or an equivalent of the earning power of the truck less allowance for depreciation. The arbitrator must say what is the reasonable sum in each case, judging for himself.

In the result I am of opinion that the conclusion of Fletcher Moulton L.J. was right, and that an arbitrator appointed under the Act alone had jurisdiction to determine the subject-matter of this action. Whether he will think in this case that the cost of hiring another waggon should be allowed I do not know, and I express no opinion on that subject. But he is the person to determine that point.

LORD MACNAGHTEN. My Lords, I am of the same opinion. And I cannot help saying that I am rather surprised to find that so much difficulty has been made over the enactment which your Lordships are called upon to construe.

It was not disputed that, before the railway legislation of 1891, it was the practice of railway companies to convey their customers' empty coal trucks free of charge on the homeward journey, and on the outward journey too, when forwarded for the purpose of being loaded. And, moreover, it was not disputed that, so long as these services were performed gratuitously, such

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a thing as an action at law for undue detention of empty coal trucks was never heard of.

Then came the legislation of 1891. The enactment with which the appellants are concerned is the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxii.). By s. 5 of that Act, where merchandise is conveyed in trucks belonging to the company, the company is authorized to charge "a reasonable sum by way of addition to the tonnage rate" for certain services, including the detention of trucks for the accommodation of customers. On the other hand, by s. 6, in the case of merchandise conveyed in trucks not belonging to the company, traders are given the right of recovering "a reasonable sum by way of demurrage" for undue detention of their trucks.

Any difference arising under either of these two provisions is to be determined by an arbitrator, to be appointed by the Board of Trade at the instance of either party.

Sect. 23 prohibits the company from making any charge for the return of empty trucks, or for forwarding empty trucks for the purpose of being loaded. Thus the services in relation to these matters which were formerly gratuitous are now, by force of the statute, included in the contract of carriage.

In the present case the railway company admits that a coal truck belonging to Messrs. Phillips & Co. was unduly detained on the railway, and that in consequence Messrs. Phillips & Co. hired an emergency truck for which they had to pay. Messrs. Phillips & Co. brought an action in the county court to recover the sum so paid from the company. The company having offered a smaller sum, which was refused, contends that the difference that has arisen must be determined by arbitration, and that Messrs. Phillips & Co. have no other way of enforcing their claim. Messrs. Phillips & Co. say that what they are claiming is special damage, and that a claim for special damage does not fall under s. 6, even if a claim for breach of contract be within it.

The first question, and in my opinion the only real question, is, Has the claim of Messrs. Phillips & Co. arisen under the section? But for the section the claim could not have arisen

at all. The claim is for undue detention. The substance of the claim is not affected by the measure of damages which the claimant seeks to apply. The claim must therefore, as it seems to me, come under s. 6, unless there is something in the section itself to exclude it.

It was argued that a claim for special damage is excluded by force of the words "by way of demurrage." The appellants contend that these words cannot have that effect. As I understood their argument, their view was that these words add little or nothing to the meaning of the provision. I agree that they do not exclude special damage if there be a case for it. But I hesitate to say that the words are superfluous. It seems to me that they have a definite meaning and a definite purpose. What does "demurrage" mean? I am content to take the meaning from the considered judgment of the Court of Exchequer in *Lockhart* v. *Falk*. (1) The question there turned on the construction of a charterparty. The judgment was delivered by Cleasby B. "The word demurrage," said the learned judge, "no doubt properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified in or to be collected from the instrument; but it has also a popular or more general meaning of compensation for undue detention." Here it cannot have its proper signification. It must mean compensation for undue detention. But it imports, I think, or connotes something more. Considering the source from which the word is borrowed and the subject to which it is commonly applied, I think it denotes that a truck unduly detained is to be regarded (just like a ship under charter) as a profit-earning chattel—as a vehicle running for profit and unduly detained in the course of its journey without any fault on the part of its owner. If this be the true explanation of the use of the word "demurrage" in s. 6, the enactment is plain enough, and it must be competent for the arbitrator in case of difference to award a reasonable sum for detention, whether the sum claimed would in an action at law fall under the head of ordinary or special damage.

It was not seriously argued that the action could be

(1) (1875) L. R. 10 Ex. 135.

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maintained if the difference between the parties is one arising under s. 6.

I am therefore of opinion that the county court judge was right in holding that he had no jurisdiction, and that his order should be restored, with costs here and below.

LORD ATKINSON. My Lords, I concur.

LORD COLLINS. I concur.

Orders of the Court of Appeal and the King's Bench Division reversed: judgment of the county court judge restored, with costs here and below.

Lords' Journals, February 4, 1908.

Solicitors: *R. R. Nelson; Burn & Berridge.*

[HOUSE OF LORDS.]

H. L. (E.) 1908 *Feb.* 6.

JAMES NELSON & SONS, LIMITED . . . APPELLANTS;

AND

NELSON LINE (LIVERPOOL), LIMITED . RESPONDENTS.

Ship—Charterparty—Lay Days—Exception of Sundays and Holidays—Loading done on Holidays by Mutual Consent—Despatch Money—Days saved in Loading.

By a charterparty, "Seven weather working days (Sundays and holidays excepted)" were "to be allowed by shipowners to charterers for loading," and for any time beyond that period the charterers were to pay demurrage at the rate of 40*l.* per day, and "for each clear day saved in loading the charterers" were to "be paid or allowed by the owners the sum of 20*l.*" The loading of a ship under this charterparty was continued during holidays. No evidence was given of any agreement in fact varying the terms of the charterparty and providing that the holidays in question should count as lay days:—

Held, that no inference of law could be drawn so varying the terms, and that the charterers, having loaded in days less than the lay

days, were entitled to despatch money (20*l.* per day) for days "saved in loading."

Decision of the Court of Appeal, [1907] 2 K. B. 705, reversed.

THIS appeal turned entirely upon questions of fact—not law—and upon the true construction of the terms of an obscure charterparty. One clause of the same charterparty was condemned as unintelligible in this House: see *Nelson Line (Liverpool), Ld.* v. *James Nelson & Sons, Ld.* (1) The facts and the material clauses of the charterparty are set out in the judgment of Lord Loreburn L.C., with the contentions on both sides. The appeal was from a decision of Vaughan Williams and Buckley L.JJ., Fletcher Moulton L.J. dissenting.

1907. Nov. 21, 27. *Atkin, K.C.*, and *Leslie Scott* (*Isaacs, K.C.*, with them), for the appellants.

J. A. Hamilton, K.C., and *Horridge, K.C.* (*Maurice Hill* with them), for the respondents.

Isaacs, K.C., in reply.

The House took time for consideration.

Feb. 6. LORD LOREBURN L.C. My Lords, in this action the plaintiffs, appellants here, claim despatch money for days saved in loading two steamships of the defendants, the *Highland Heather* and the *Highland Enterprise*. They also claim a return of demurrage money paid under duress. And the defendants counter-claim for still more demurrage on the same vessels.

The relevant facts are very few. By an agreement of June 18, 1904 (which will have to be considered presently), the plaintiffs were bound to load frozen meat and offal on these two ships and on others forming a two-weekly service from the River Plate to England. The *Highland Heather* was ready to load on March 5, 1906, and the defendants, the shipowners, claimed that the lay days began on March 6. The *Highland Enterprise* was ready to load on March 14, and defendants claimed that the lay days began on March 15. On the other hand, the plaintiffs (charterers) claimed that the lay days began on March 7 and on

(1) Ante, p. 16.

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March 21 respectively. The ground of difference really amounted to this. In the shipowners' view the lay days began to run when they had berthed their vessel and given a twelve hours' notice. In the charterers' view that was subject to a condition, namely, that the vessels tendered for loading should be tendered at such times as were suitable to two-weekly sailings, with intervals of fourteen days between each sailing.

Minor questions as to whether holidays were to count as lay days and as to an exception of strikes were raised, but the first and main question was that which I have stated.

The contract which must regulate this controversy is dated June 18, 1904, and is called a charterparty. It is an agreement by shipowner to supply and by charterer to fill a part of each vessel. The rest of the space was to be filled with cargo of others.

To begin with, let us see what this contract is taken as a whole. It has already been considered by this House in another appeal (1), and a part of it found so ambiguous that on one point effect could not be given to the words used. Still, the main purpose of the document is fairly clear.

The owners bind themselves to run a two-weekly line of steamers from the River Plate to Liverpool, and a monthly line from the River Plate to London. They also agree that the sailings from the River Plate shall be at intervals of fourteen and thirty days respectively. I say no more about the London sailings with the thirty days' interval, for Liverpool sailings at a fourteen days' interval alone are in question here. This is under the 2nd clause of the agreement.

The charterers bind themselves to ship in each vessel sailing in the lines above mentioned so much frozen meat and offal as will fill certain insulated chambers.

So much is, I think, pretty clear. Then comes the question which lies at the root of this litigation. What are the duties under this contract of shipowners and charterers respectively as to the time when the several vessels of these lines are to begin loading and the lay days are to begin and the charterers are bound to load? The clauses dealing with these important details have to be considered, but in considering them we must

(1) Ante, p. 16.

bear in mind, as it seems to me, that the obligations to load and to give facilities for loading are all obligations in reference to a regular two-weekly service, with intervals of fourteen days between the sailings as provided by clause 2 of the agreement, and must be construed in reference to that.

Apart from clause 2, there are three clauses providing for these matters.

By clause 1 the owners engage as from the date when their respective vessels arrive in the River Plate, and are ready to load outwards, to place the vessels of the line at the disposal of the charterers for the carriage of the frozen meat. Nothing can be clearer. The charterers are to be the first to load this space reserved to them in the vessels as soon as they are ready to load. But then comes clause 7. Under that clause each steamer, either before or after loading meat from the charterers, may load for owners' benefit meat or any other cargo of any kind for her intended voyage at any port or ports in the River Plate or tributaries, or on the east coast of South America. This clause 7 absolutely contradicts clause 1. I am compelled to give effect to it, and I can only conclude that the shipowner's obligation under clause 1 is subject to his right to break it under clause 7. So that the charterers are not to be the first to load the vessels if the shipowners choose first to load for their own benefit some other goods. If the shipowners do not so choose (which I understand is this case), then the charterers are the first to have the vessel at their disposal.

That being so, clause 6 remains to be considered. It provides that, on arrival of each steamer at her loading berth (fixed by charterers) in the River Plate, notice shall be given to the charterers or their agents, in writing, of her readiness to load. The notice is not to be given until a certain temperature is attained in the insulated chambers, which is to be maintained up to the time of shipment beginning. Twelve hours after such notice (subject to the point of temperature, which does not arise here) the lay days are to begin, and provisions for demurrage and despatch money are appended.

Now the main controversy in this case arises on this clause. The shipowners say that they are entitled to take their vessel to

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the loading berth when they please, and that as soon as they have given the notice (always subject to the point of temperature), then twelve hours later the lay days begin. They maintain that they may give such notices at intervals of, say, seven or twenty-one or even twenty-eight days, or at less than seven days' interval, and that the charterer is bound to load on pain of paying demurrage, and that clause 6 is wholly independent of clause 2. One mitigation, and only one, do they admit. If the notices are given at such times as to frustrate the commercial adventure altogether, in that case alone, they say, the charterer may with impunity refuse to load. If there was any breach of clause 2, which required an interval of fourteen days between the days of sailing, then, they say, that may be compensated by damages, but is not a ground for refusing to load.

On the other hand, the charterers maintain that the 2nd clause must be read with the 6th clause, and must control it, and that they were under no obligation to begin loading a vessel until such date as would suit an interval of fourteen days between the sailings.

In my opinion the charterers' contention ought to prevail. Indeed, the shipowners flinch from pushing their own argument to its logical conclusion. If, as they contend, the 6th clause is quite independent of the 2nd clause, I do not see why any limitation should be placed upon their right to berth the vessel and give notice to load at any time. Their admission that, if given at such a time as to frustrate the commercial adventure, the notice may be disregarded partially relieves their argument from being utterly impracticable and unbusinesslike. But it also shews, what is to my mind plain on other grounds, that clause 6 is not an independent clause, and that some limitation must be placed on the liberty to berth and give notice, which in the language of that clause, standing by itself, is unrestrained. I think the limitation is that the berthing and the notice must be at such times as will suit an interval of fourteen days between the sailings from the River Plate. In other words, it must be a berthing and a notice appropriate to a service of steamers sailing every fortnight with intervals of fourteen days. Mr. Hamilton enumerated the contingencies which might arise between notice and sailing, as if to shew that it was not possible

so to fix a berthing and a notice as to be sure it would square with sailings at fourteen days' interval. I do not think there is any real business difficulty; but that is what, in my view, the shipowners have contracted to do, and there are plenty of exceptions which might relieve them in proper cases. Also, the obligation is fairly elastic. It is not that there must be fourteen days between the notices, but such a period as is appropriate to sailings at an interval of fourteen days; for the whole agreement is dominated by the central fact that everything is arranged for a two-weekly service, with regular sailings, and it is unnecessary to repeat that in every clause.

In substance, therefore, I think the charterers are right, and that, subject to two other points, they are entitled to judgment on claim and counter-claim in respect of despatch money and demurrage.

The second point is a very short one. Under the agreement Sundays and holidays are not to count as lay days. In fact, there were some holidays during which one of the ships was loaded by the charterers with consent of the master. No special arrangement was made. But the Court of Appeal held (apparently regarding it as a point of law) that an agreement to treat the holiday as a working day, and so count it among the lay days, ought to be inferred from the mere fact of working by consent. This inference seems to have been drawn in other cases, and those cases were treated as binding in law. In my view it is a question, not of law, but of fact, whether or not there was an agreement varying the terms of the charterparty and providing that the holidays in question should count as lay days. I am unable to see any evidence of such an agreement. Very likely it was convenient to both sides to do what was done. I do not believe it entered into the heads of either that they were making such an agreement as is suggested. At all events, there is no proof of it, and therefore the charterparty, which excludes holidays, must prevail.

In regard to the last point, that some allowance is to be made for strikes, this House cannot entertain it, for it was not decided by Channell J. or argued in the Court of Appeal. It must go to be determined as an issue in the action.

[His Lordship moved that the appeal be allowed, subject to the terms set forth at the end of this report.]

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EARL OF HALSBURY. My Lords, this instrument has been already the subject of disputed construction before your Lordships' House, with the result that the particular part then under debate was not considered to be susceptible of any definite meaning. (1)

It is, however, only justice to the draftsman to consider what was sought to be done by this agreement. It consists of thirty-six clauses and two schedules. It was sought to regulate the rights and duties of eleven vessels, whereof the bills of lading were to form part of the agreement. This was to be done by the compendious 36th clause, which is: "This agreement shall apply to each vessel belonging to either of the owners' lines to Liverpool or London which shall have begun actually to load her cargo in the River Plate on or after the 1st day of January, 1904, and the rights of the parties in reference thereto and to the cargo to be so loaded or carried shall be hereby governed." Sufficient indistinctness is already intimated by those words; but when one considers the substance of the clauses, and finds out that the shipowners and the shippers, or the charterers, are from time to time to take each other's places in respect of their rights, it is no wonder that disputes have arisen—indeed, it would have been something in the nature of a miracle if disputes had not arisen between the parties.

Inasmuch as the agreement primarily had to do with the importation of foreign meat, provisions are inserted with reference to the machinery appropriate to such a business and the maintenance of the proper temperature. The agreement is to operate in turn as the charterparty of each of the vessels in the schedule, and it recites that: "Whereas the owners have services of cargo and live stock steamers which they are running or propose to run as a two-weekly line from the River Plate to the port of Liverpool and as a monthly line from the River Plate to the port of London, and the charterers have agreed to ship their output for the United Kingdom of frozen meat and offal by the said lines and the owners have agreed to carry same on the conditions hereinafter contained." In clause 2 it is again expressly provided: "The service of the lines hereunder is, subject as hereinafter provided, to be a two-weekly one to the

(1) Ante, p. 16.

port of Liverpool and a monthly one to the port of London having the sailings at intervals of fourteen and thirty days respectively, and to last for one year from the 1st January, 1904, and to be subject to continuance as hereinafter provided."

It seems to me that the main purpose, the design and the essence of the agreement between these parties, was the maintenance of this two-weekly line to the respective ports indicated, and the parties made all their other stipulations with reference to this main purpose.

This brings me to the point where the clauses of this very complex instrument come into conflict, as I think they most certainly must have done sooner or later. I agree with the Lord Chancellor as to what as matter of construction must be the result.

The second point seems to me to be the more important one—I do not mean the more important point as between these particular parties, but as general matter of law, since I do not think we shall have more such documents sent to us to construe—I mean the claim to treat as matter of fixed law the question of lay days being counted when, though holidays, they were used by the charterers for the loading of one of the ships. As to that, I entirely agree with the Lord Chancellor in refusing to infer something of which there is no evidence. I do not deny that there are some things so commonly known and practices so universal that, without evidence other than the transaction itself, one infers a contract. What the parties do is itself, where there is such a known course of dealing, evidence of their agreement. In such a case the mere action of the parties in accordance with usage is of itself evidence of a contract. But as there is no such ascertained usage applicable to this case, I for one decline to infer what is not proved. In this case it is enough for me to say that I do not think the circumstances are such that anybody can, from the mere action, infer any particular agreement. This case does not come within the category to which I have referred. I do not know whether it was more for the advantage or convenience of one or the other, the shipowners, the charterers, or anybody else, to do otherwise than they did. It might have been more convenient to either or to both that the work should go

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on notwithstanding the holidays; at all events, there is no evidence from which I can properly infer anything on the subject. It appears to me, therefore, that I have no right to infer what is not proved, and still less to put as though it were a matter of law that which, if it is proved at all, is simply a matter of fact.

I concur also in the rest of the Lord Chancellor's judgment.

LORD MACNAGHTEN. My Lords, I have had the advantage of reading in print and considering the judgment which has been delivered by my noble and learned friend on the woolsack. I agree with it, and with the judgment of my noble and learned friend opposite (Lord Halsbury).

LORD ATKINSON. My Lords, I concur.

Order of the Court of Appeal reversed: Judgment to be entered for the plaintiffs (appellants) for the sums of 80*l.* *and* 182*l.* 10*s.* *in their claim, and also for the plaintiffs on the counter-claim, subject to the issue whether the discharge of the* Highland Heather *and* Highland Enterprise, *and in consequence their arrival at the plaintiffs' factory, was delayed by strikes and the consequent congestion of shipping as claimed by the defendants: Declaration that the said issue, not having been decided either by Channell J. or by the Court of Appeal, or by this House, remains to be decided in this action, and that this judgment be, if necessary, altered accordingly: That, subject to any order that may be made by the Court determining the issue left undetermined by this House for costs arising in consequence of such issue, the respondents pay the appellants their costs here and below.*

Lords' Journals, February 6, 1908.

Solicitors: *Charles Russell & Co., for Lightbound, Owen & MacIver, Liverpool; Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

[HOUSE OF LORDS.]

NEW MOSS COLLIERY, LIMITED . . . APPELLANTS; H. L. (E.)

AND 1908

LORD MAYOR, &c., OF MANCHESTER . . RESPONDENTS. *Feb.* 28.

Mines — Waterworks — Reservoir — Lands purchased by Agreement for the Purposes of Waterworks — Mines and Minerals purchased together with Lands—Right to Support from Minerals under adjacent Land — Limit of Forty Yards—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 18-27.

Under a special Act, which gave the respondents power to purchase land by agreement, but not compulsorily, and incorporated the Waterworks Clauses Act, 1847, the respondents bought land from T., including all mines and minerals underneath, and also bought adjacent land from S., who reserved the right to work the coal underneath without making any compensation. The respondents constructed waterworks upon both pieces of land. The appellants, who were lessees of the coal from S., gave the respondents notice under s. 22 of the Waterworks Clauses Act, 1847, of their intention to work the coal under the land bought from S. The respondents gave no counter-notice:—

Held, that the land bought from T. having been bought by agreement enjoyed the common law right it had always possessed to lateral support from the land bought from S., this right not being affected by the Waterworks Clauses Act, 1847; and that the appellants were entitled to an injunction restraining the lessees from working the coal either within or beyond the forty yards belt round the waterworks so as to damage the land bought from T.

Decision of the Court of Appeal, [1906] 2 Ch. 564, affirmed.

THE facts relevant to this appeal are stated in the judgment of Lord Loreburn L.C., and also in the reports of the decisions below. The respondents having brought an action to restrain the lessees of S. (Lord Stamford) from working the coal so as to damage the land bought from T. (Mr. Taylor), Farwell J. dismissed the action. (1) This decision was reversed by the Court of Appeal (Vaughan Williams, Romer, and Cozens-Hardy L.JJ.), who granted an injunction. Hence this appeal.

Jan. 30, 31; Feb. 6, 7. *Cripps, K.C.*, and *Upjohn, K.C.* (*MacSwinney* with them), for the appellants. The provisions of

(1) [1906] 1 Ch. 278.

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the Waterworks Clauses Act, 1847, ss. 18-27, constitute a code by which, exclusively of the common law, the rights and obligations of the parties are to be ascertained. The principle was applied in this House in *Eden* v. *North Eastern Ry. Co.* (1) The undertakers are not in the position of ordinary owners; they possess, not common law rights, but only such as are defined by the statute. In *Great Western Ry. Co.* v. *Bennett* (2), under the Railways Clauses Act, it was held that the company could not claim the benefit of subjacent and adjacent support, the statute being the specific law in such matters. Lord Cranworth spoke of the "new code" established. Lord Westbury said that the "ordinary implication applicable to a grant is . . . . entirely excluded." The decision was in effect an affirmance of *Fletcher* v. *Great Western Ry. Co.* (3) In *Pountney* v. *Clayton* (4) the principle is clearly laid down. These cases come under the Railways Clauses Act, the provisions of which in this connection are identical with the Waterworks Clauses Act, 1847, except that in s. 23 of the latter Act the owner or lessee of mines, in the absence of notice by the undertakers, may work and drain their mines "as if this Act and the special Act had not been passed." Moreover, in the Railways Clauses Act the words are, "With respect to mines lying under and near the railway"; but in the Waterworks Clauses Act the words introducing s. 18 are simply, "With respect to mines." In *Consett Waterworks Co.* v. *Ritson* (5) A. L. Smith J. and Cave J. differed. The former held that he was bound by *Pountney* v. *Clayton* (4), that, in the absence of notice to treat for the minerals, the company, which had purchased compulsorily, had no right of support.(6) He also held that the reference to the Act and the special Act imposed no greater obligation on mine owners under waterworks than lay on owners under railways. The counter-notice to stop working can be given at any time after the notice to work has been received: *Dixon* v. *Caledonian and Glasgow and South Western Ry. Cos.* (7) In *Lord Provost of*

(1) [1907] A. C. 400.
(2) (1867) L. R. 2 H. L. 27.
(3) (1859) 4 H. & N. 242; (1860) 5 H. & N. 689.
(4) (1883) 11 Q. B. D. 820; 844, per Bowen L.J.
(5) (1889) 22 Q. B. D. 318.
(6) Ibid. at p. 328.
(7) (1880) 5 App. Cas. 820.

Glasgow v. *Farie* (1) Lord Macnaghten says of ss. 18-27 of the Waterworks Clauses Act as compared with the corresponding sections of the Railways Clauses Act: "These sections have a much wider bearing. They extend to mineral property under the lands of the undertakers or the company, however it may have been severed in ownership from those lands." In *Midland Ry. Co.* v. *Miles* (2) Pearson J. said: "A railway company and the rights of a railway company are the creatures of statute, and . . . . a railway company does not stand with regard to its land in the same position as an ordinary purchaser in fee simple absolute." The respondents claim the benefit both of the common law and of the statute. When it suits them, they claim the benefit of the statute, and when the statute does not suit them, they claim the benefit of the common law. But the complete exclusion of the common law and the exclusive application of the statute are affirmed in *In re Lord Gerard and the London and North Western Ry. Co.* (3): see p. 470, where Rigby L.J. quotes Lord Cranworth and Lord Herschell to this effect; see also *Ruabon Brick and Terra Cotta Co.* v. *Great Western Ry. Co.* (4), per Lindley L.J.

Sir Robert Finlay, K.C., and *Jenkins, K.C.* (*H. F. Moulton* with them), for the respondents. The rights which were enjoyed before the purchase are still enjoyed by the corporation; and the appellants are not entitled to work beyond the area which was permissible in the time of the corporation's predecessors in title. The respondents are entitled to all their common law rights. The code, as it has been called, does not apply where compulsory powers have not been exercised. In *Caledonian Ry. Co.* v. *Sprot* (5) it was laid down that a conveyance to a railway company for the purposes of the line gives a right by implication to all reasonable subjacent and adjacent support; though the minerals are reserved, the grantor is not entitled to work them, even under his own land, so as to endanger the railway. In *Elliot* v. *North Eastern Ry. Co.* (6) Lord Kingsdown

(1) (1888) 13 App. Cas. 657, at p. 690.
(2) (1885) 30 Ch. D. 634, at p. 638.
(3) [1895] 1 Q. B. 459.
(4) [1893] 1 Ch. 427.
(5) (1856) 2 Macq. 449.
(6) (1863) 10 H. L. C. 333, at p. 363.

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says: "Does this recognition of the common law right to subjacent support afford any inference of an intention to exclude the common law right to lateral support? I can see no foundation for any such inference. . . . . This question seems to me to be settled by the decision of your Lordships in *Sprot's Case*." (1) The cases cited for the appellants were all cases simply of grantor and grantee, and the land belonged to one owner; and no distinction has been made between the right to support of land and of building. The quotations made by Rigby L.J. in *Lord Gerard's Case* (2) have no application to land not purchased under compulsory powers. In *Pountney* v. *Clayton* (3) there was no right of support at all. The purchaser from the railway had no greater rights than the selling company, which had bought the surface only and had given no notice with respect to the mines. *Consett's Case* (4) was ultimately decided on grounds which have no application to this appeal. The Waterworks Clauses Act does not entitle the appellants to withdraw support from the respondents' lands outside the prescribed distance, and the respondents are entitled to an injunction.

Cripps, K.C., in reply.

The House took time for consideration.

Feb. 28. LORD LOREBURN L.C. My Lords, the facts upon which this appeal depends are simple. The corporation of Manchester desired to construct waterworks, and for that purpose purchased two pieces of land under their special Act which gave them power to purchase by agreement but not compulsorily. The first piece of land they bought from Lord Stamford. It is coloured yellow. In this conveyance only the surface was granted to the corporation, and the vendor reserved the right to work the minerals without making compensation. The second piece of land was bought from Mr. Taylor. It is coloured pink, and the conveyance included both the surface and all mines and minerals underneath.

In time the waterworks were constructed covering part of

(1) 2 Macq. 449.
(2) [1895] 1 Q. B. 469.
(3) 11 Q. B. D. 820.
(4) 22 Q. B. D. 318.

this pink land. And now the owner of minerals beneath the yellow land is excavating his minerals so as to damage the natural surface of the pink land. The excavations which do this damage are partly outside and partly inside a belt of forty yards in width round the works of the Manchester Corporation. Before excavating within the forty yards belt the mine owners under the yellow land gave to the corporation a notice under s. 22 of the Waterworks Clauses Act, 1847. No counter-notice was given.

In these circumstances the question to be decided is, whether the mine owners ought to be restrained from mining so as to damage the pink land—firstly, as to mines under the yellow land within the forty yards belt; secondly, as to mines under the yellow land outside the forty yards belt? In my opinion the Court of Appeal was right in granting an injunction under both these heads.

It was urged in argument that the mine owners were entitled to do what they had been doing by virtue of the Waterworks Clauses Act, 1847.

That Act provides that in the case of a purchase under the compulsory powers of a special Act all mines shall be deemed to be excepted in the conveyance of such land unless they shall have been expressly referred to therein and conveyed thereby.

The House of Lords have decided in *Great Western Ry. Co.* v. *Bennett* (1) upon similar railway clauses that the statutory purchaser in such case cannot claim the benefit of the right of an ordinary purchaser of the surface to subjacent and adjacent support, the statute having created a specific law for such matters by which alone rights of the company and the mine owners are regulated. In *Bennett's Case* (1) the question was between undertakers who had compulsorily purchased the surface and the vendor who had retained the minerals.

I cannot see what relevancy that decision has to the present case. Here the purchase of the pink land was voluntary, and the Manchester Corporation had no power to buy compulsorily. Further, in buying the pink land the corporation bought not only the surface, but also the minerals underneath, and bought therewith the right to lateral support from the yellow land which the

(1) L. R. 2 H. L. 27.

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pink land had always possessed. I do not understand how a decision as to the rights created between vendor and purchaser upon the separation of surface from underlying minerals can govern the rights between the owners of two plots of land between whom there is no privity of contract.

The Waterworks Clauses Act, 1847, also contains clauses 22 and 23, which, in the absence of agreement, require the owner of any mines or minerals beneath or within a prescribed distance of the undertakers' works, or, if no distance is prescribed, then within forty yards, to give notice to the undertakers before he works the same. And the undertakers may buy the necessary support on paying suitable compensation. If they do not give such notice, then certain consequences follow, to which I will presently advert.

No doubt the present appellants were bound to give notice under s. 22. But what is the consequence of their having done so and no counter-notice having been given? For that we must look to s. 23. It seems to me that the effect of s. 23 is as follows: The mine owner is authorized to work into the belt as if the Act of 1847 and the special Act had not been passed—that is to say, if he has apart from the Acts a right to let down the surface he may do so. If he has no such right, then the Acts do not enable him to do so. In any case he must not wilfully damage the works or work his mines in an unusual way.

Now, if these Acts had not been passed, the owner of the pink land would have had indisputably a right for lateral support of his surface in its natural state against the owner of minerals beneath the yellow land, and I am quite unable to see how this right has been destroyed.

It was strenuously argued by Mr. Cripps that the Waterworks Clauses Act, 1847, operates to obliterate all pre-existing right to support for the surface from minerals, either subjacent or adjacent to the works, whenever lands are purchased by virtue of the Act. I can see no ground for such a contention. It would involve a free gift to neighbouring mineral owners of a most valuable right, and a ruinous withdrawal from the undertakers of rights most essential to the safe maintenance of waterworks, without compensation, and, so far as I can see, without reason. The

Legislature might do such a thing, no doubt, but I find nothing in the Act that says this even indirectly. Nor do I find any judicial authority for it antecedent to the decision of Farwell J.

The argument of Mr. Cripps, when analysed, really amounted to this, that because a conveyance under the Act of surface leaving minerals in the hands of the vendor does not confer upon the surface a right to support, therefore whenever any land is bought by undertakers by virtue of the Act every easement for support heretofore attaching to it, whether vertical or lateral, is destroyed. I shall not so hold unless directed by an Act of Parliament or by authority which I am compelled to follow.

Accordingly I am of opinion that the pink land still enjoys the right of support for the natural surface against the yellow land which it always possessed, and that the decision of the Court of Appeal was right.

LORD MACNAGHTEN. My Lords, I agree, and I wish to adopt the judgment of the Master of the Rolls.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD ATKINSON. My Lords, I concur that this appeal should be dismissed. The facts have been already fully stated; it is unnecessary to repeat them. The decision of the case turns mainly on the construction of three sections of the Waterworks Clauses Act, 1847, and the determination of the subject-matter to which those sections apply.

Sect. 18 obviously deals with the owner of those mines which lie under land sold by him to the undertakers.

Sects. 22 and 23 are wider in their scope, and deal with three classes of mine owners: (1.) Those who own mines which lie under the works and buildings of the undertakers. (2.) Those who own mines lying under the works and pipes described in certain plans, kept and deposited by the undertakers in manner provided by the three preceding sections. (3.) Those who own mines lying within the prescribed distance, or, if no distance be prescribed, within forty yards "therefrom," i.e., I presume, from the reservoirs, buildings, or underground pipes and works of the undertakers so described,

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In the first class of cases the undertakers would necessarily be the owners of the surface. And several authorities have been cited in argument, from *Great Western Ry. Co.* v. *Bennett* (1) downwards, to establish that, in purchases of lands by undertakers under their compulsory powers, mines being reserved to the grantor, there is no grant by implication of the right to have the surface supported by the subjacent minerals, such as would be implied in the case of a grant to an ordinary purchaser, but that the mutual rights and obligations of the grantor and grantee, the mine owner and the surface owner, are regulated entirely by the code contained in the Waterworks Clauses Act, 1847.

In class No. 2 the undertakers would most probably, but not necessarily, be the owners of the surface, since it is conceivable that they might only acquire wayleave for their underground pipes.

And in class No. 3 the surface of the land between the limit and their reservoirs, buildings, underground pipes, or works, might or might not belong to the undertakers, the plain object of the statute being to give them the opportunity of securing by the purchase of mines, if they so desire, not only subjacent but also adjacent support for their reservoirs, buildings, underground pipes, and works.

No reference, however, is made in the statute to lands belonging to the undertakers upon which reservoirs or buildings have not been constructed or erected, or in which pipes and works have not been laid or sunk.

Their rights and obligations in reference to lands of this latter description are left untouched by the code, to be regulated and determined by the common law.

Again, these three sections deal with mines which belong to persons other than the undertakers, and I am quite unable to discover anything in the statute or in the authorities to which we have been referred to deprive the undertakers, where they own both the surface and the subjacent minerals, of such a natural right of lateral support as any owner of lands and the minerals beneath them would at common law be entitled to.

(1) L. R. 2 H. L. 27.

It is conceded that the north part of the reservoir is upon Taylor's land. It is further conceded that the workings in Lord Stamford's land, partly within and partly without the limit of forty yards, have caused a subsidence of that part of the reservoir so situate, and would by reason of the deprivation of its lateral support have caused a subsidence of this land even if the reservoir had never been built upon it. The defendants, as owners of the mines under the land sold by Lord Stamford, gave the notice required by s. 22, and no counter-notice was given by the plaintiffs. Under these circumstances it appears to me that the owner of the minerals under Lord Stamford's land, provided he did no wilful damage and did not work his mines in an unusual manner, could work them so as to let down the surface of Lord Stamford's land if he so desired, because though s. 23 provides that the mines may be worked "as if this Act and the special Act had not been passed," yet, according to the several authorities cited, the plaintiffs never acquired the right to have the surface supported such as an ordinary grantee of the surface would by implication have acquired. They got the statutory right in lieu of that implied right, and the fact that they have not availed themselves of this statutory right to the full cannot operate to vest in them the right for which the statutory right was a substitute.

But with regard to Taylor's lands none of that reasoning applies. There the plaintiffs had the right of lateral support vested in them by the purchase from Taylor, and as the words "as if this Act and the special Act had not been passed" cannot operate to vest in the plaintiffs a right in reference to Lord Stamford's land which they never had, so neither can it operate to deprive them of the right they had acquired and would, if the parties were remitted to their original positions, have been entitled to enjoy and enforce. I concur with Cozens-Hardy L.J. in thinking that the result as to Taylor's land would be the same whether the workings which caused the subsidence were within or without the forty yards limit, and I approve of the results at which he arrived and of the reasoning by which he arrived at them. I, therefore, am of opinion that this appeal should be dismissed with costs.

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LORD COLLINS. My Lords, I agree. I desire to adopt the judgment of Cozens-Hardy L.J. in the Court of Appeal.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, February 28, 1908.

Solicitors: *Bower, Cotton & Bower, for H. G. Hall, Ashton-under-Lyne; Austin & Austin, for Sir William Henry Talbot, Manchester.*

[HOUSE OF LORDS.]

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Feb. 28.

SIR JOHN JACKSON, LIMITED . . . . . APPELLANTS;

AND

OWNERS OF THE STEAMSHIP "BLANCHE," HER MASTER AND CREW, AND OTHERS . . } RESPONDENTS.

THE HOPPER No. 66.

Admiralty—Collision—Limitation of Liability—"Owners"—Charterer by Demise—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504 —*Merchant Shipping Act*, 1906 (6 *Edw.* 7, *c.* 48), *s.* 71.

The charterer of a ship by demise who has control over her and navigates her by his own master and crew is "owner" of the ship within ss. 503 and 504 of the Merchant Shipping Act, 1894, and entitled to the limitation of liability to damages conferred upon "owners" by those sections.

Decisions of Bargrave Deane J., [1906] P. 34, and of the Court of Appeal, [1907] P. 254, reversed.

THE facts material to this appeal are stated in the judgment of Lord Loreburn L.C. Claims having been made by the respondents against the appellants in respect of the damages caused by the collision, an action against the respondents was brought by the appellants for a limitation of their liability in accordance with ss. 503 and 504 of the Merchant Shipping Act, 1894. Bargrave Deane J., who tried the action, held that the appellants were not "owners" of the ship within those sections, and that decision was affirmed by the Court of Appeal (Sir

Gorell Barnes, Fletcher Moulton and Kennedy L.JJ.). Hence this appeal.

Jan. 22, 23. *J. A. Hamilton, K.C.*, and *Dawson Miller*, for the appellants. The sole question is whether the term "owners" in ss. 503 and 504 of the Merchant Shipping Act, 1894, which limits in certain cases the owner's liability, includes charterers by demise. There is no definition of the word in the Act; but owners pro tempore or pro hac vice and captains have in many cases for other purposes been treated as owners. In *Colvin* v. *Newberry* (1) the master of a ship under a charter-party was held liable (as owner) to shippers of goods. In *The Spirit of the Ocean* (2) "owner" was held to include unregistered as well as registered owners; and see Lord Herschell's words in *Baumwoll, &c.* v. *Furness*. (3) In *The Lemington* (4) the charterers were held to be in the position of owners and liable in rem for damages to another ship caused by the negligence of the crew, who were under the charterers' orders. In *Hughes* v. *Sutherland* (5) the equitable owner, who had an enforceable right to purchase a share in a ship, was regarded as owner so as to incur a penalty under the Merchant Shipping Act, 1854. In *Meiklereid* v. *West* (6) a registered owner who had chartered his ship was held, under the section of the Act of 1854 which corresponds with s. 143 of the Act of 1894, not to be liable for an allotment note given to a seaman by the master, who was engaged by the charterer, the latter having become bankrupt. In *Five Steel Barges* (7) Sir James Hannen, in the case of salvage, said: "The right to sue in personam is not confined to the case of the defendant being the actual legal owner of the property saved." In that instance the person who had sold the property to the Government was treated as owner.

In questions with respect to land the word "owner" has often been applied to lessees or occupiers: *Lister* v. *Lobley* (8); *Chauntler* v. *Robinson*. (9) There is no definition in the Act of

(1) (1832) 1 Cl. & F. 283.
(2) (1865) Br. & L. 336.
(3) [1893] A. C. 8, 17.
(4) (1874) 2 Asp. M. L. C. 475.
(5) (1881) 7 Q. B. D. 160.
(6) (1876) 1 Q. B. D. 428.
(7) (1890) 15 P. D. 142.
(8) (1837) 7 Ad. & E. 124.
(9) (1849) 4 Ex. 163.

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1894 of the term "owner," and the Act must be taken as its own dictionary. When "the owner or master," as in s. 281, has a duty imposed upon him, clearly the chartered owner must be included. [They referred to some of the sections cited in Lord Atkinson's judgment.]

The difficulty has now been removed by legislation. The Merchant Shipping Act, 1906, s. 71, provides that ss. 502-9 are to "be read so that the word 'owner' shall be deemed to include any charterer to whom the ship is demised." That section ought to be taken as explanatory of the Act of 1894, and not as enacting anything new.

Aspinall, K.C., and *A. D. Bateson*, for the respondents. The appellants were not "owners" within the meaning of ss. 503 and 504. The word is used throughout the Act, as well as in preceding legislation, in its strict sense. The purpose of the earlier Acts was to extend our mercantile marine. The earliest Act (7 Geo. 2, c. 15), entitled "An Act to settle how far owners of ships shall be answerable for the acts of the masters or mariners," was explained and amended in 26 Geo. 3, c. 86. The same strict interpretation of the word is implied in 53 Geo. 3, c. 159, "An Act to limit the responsibility of shipowners in certain cases," and in the Merchant Shipping Act, 1854, s. 504, by which "no owner of any seagoing ship or any share therein" is to be liable in certain cases. The Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), s. 54, extends the limitation to foreign ships. The Act of 1898 (61 & 62 Vict. c. 14) extends the benefit to "owners, builders or other parties interested" for three months after launching. A further extension is given by the Act of 1900 (63 & 64 Vict. c. 32), but in all cases the benefit is to "owners" only. In *The Andalusian* (1) a vessel owned by a British subject had not been registered as a British ship at the time of the collision, and was held, therefore, not to be a "recognized British ship," and not entitled to limitation of liability under the Merchant Shipping Acts of 1854 and 1862. In *The Ripon City* (2) it was held that when a shipowner voluntarily places his vessel under the possession and control of another his liability remains. The qualifications of owners

(1) (1878) 3 P. D. 182. (2) [1897] P. 226.

enumerated in ss. 2, 5, and 9 of the Act of 1894 shew that the term "owner" must be construed in the strict sense, and the cases shew that ownership was not fulfilled before registration. The original object of the legislation would have been defeated by the construction of the appellants, as a foreigner could have gained its protection by chartering a British ship.

The sections relating to the pilot have no application, as the ship is by law taken out of the custody of owner and master alike, and placed under the control of another. In all the legislation the registered owner or the beneficial owner alone is provided for, and the latter is entitled to registration. There is no case in the books where the charterer has claimed this limitation. In salvage actions the charterer has been sued because he has had a service rendered to him, and for a like reason he is sued for wages and damages. If the charterer can be treated as owner he must be so treated to the exclusion of the real owner, otherwise there might be competitive claims for limitation of liability.

In construing an Act of Parliament the Court must adopt the verbal construction of the sections, if plain and simple: *Cope* v. *Doherty* (1), where the limitation of liability sections of the Act of 1854 were held by Wood V.-C. to have no application where one or both of the vessels was foreign. An Act must not be so construed as to interfere with existing rights beyond what is absolutely necessary: *Commissioners of Public Works* v. *Logan*. (2) The limitation of liability sections in all the Acts largely abridge common law rights, and must therefore be interpreted in the narrowest sense.

Dawson Miller in reply.

The House took time for consideration.

Feb. 28. LORD LOREBURN L.C. My Lords, there is only one question in this case, whether or not charterers to whom a ship is demised can claim the limitation of liability prescribed by

(1) (1858) 27 L. J. (Ch.) 600.
(2) [1903] A. C. 355, per Lord Davey, at p. 363.

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s. 503 of the Merchant Shipping Act, 1894? The appellants so chartered a ship, and in course of her navigation by a master and crew in the charterers' service she was negligently handled, and injured a vessel belonging to the respondents. Both the judge of first instance and the Court of Appeal have decided that the statutory limitation of liability does not apply, because the charterers were not "owners" within the meaning of the section.

It is a singular thing that, so far as can be learned, this question has never been raised before. Since 1813 there has been, in one form or other, a limitation expressly applicable to this class of liability. Whether the point has not been raised because no ship under such a charter has been to blame for a collision, or because no one thought in such case the limitation could apply, or because no one doubted that in such case the limitation would apply, cannot be known. And as soon as the decision now under appeal was first given by Bargrave Deane J. Parliament interposed. However, the case must be decided without regard to these reflections.

In my opinion this appeal ought to be allowed. If this very elaborate Act of Parliament be examined, I find it impossible to resist the conclusion urged upon your Lordships by Mr. Hamilton. The word "owner" is used in very many sections. Sometimes it means registered owner, which is, indeed, the primary sense. Sometimes it must also include beneficial owner. And in other parts it seems to me that it must of necessity also include a charterer by demise who has control of the ship and navigates her with his own master and crew. Otherwise the operation of the Act becomes impracticable. For example, the salutary provision that wages shall continue to run if not duly paid (s. 134 (*c*)) would not apply at all where the ship is chartered by demise, for the "owner" could not be in default. Or again, the provisions for notice to owner and enforcement of charge contained in s. 183 would be futile unless the word "owner" there referred to some one paying wages. Similar instances might be multiplied almost indefinitely, but it is unnecessary to enlarge upon this point, for it does not really admit of dispute.

It being thus ascertained that the word "owner" does in some

parts of the Merchant Shipping Act, 1894, include charterers by demise, is it so in s. 503?

I do not know how the proper meaning of this word in each section is to be determined except by considering the object of the section itself. When limitations were first introduced the policy declared in the preamble was the encouragement of ship-building in Great Britain. Subsequently a like limitation was applied to foreign ships also. And we must, I think, conclude that the policy of the present section was simply to prevent ruinous damages from being inflicted upon an innocent principal as the consequence of an error of judgment in a difficult and dangerous business by his agents in charge of a vessel. I can perceive no reason why the present appellants should be subject to an unlimited liability that does not equally apply to the registered owner. I cannot doubt that if charterers by demise are to be so subject there will be an end of such charters, and it is difficult to suppose that Parliament desired this.

It seems to me that the mischief against which s. 503 was intended to provide is not met by construing the word "owners" in the narrow sense, and that therefore the broader interpretation which the word undoubtedly bears in many other parts of the Act ought to be applied here.

Accordingly I respectfully advise your Lordships that the order be reversed and a declaration made as desired by the appellants.

LORD MACNAGHTEN. My Lords, I agree.

LORD ROBERTSON. I concur.

LORD ATKINSON. My Lords, the net question for decision in this appeal is new. It is this: whether the charterer of a ship demised to him under a charterparty such as that given in evidence in this case is entitled, should damages be recovered against him by persons damnified by the negligent navigation of the ship over which he has control, to limit his liability under ss. 503 and 504 of the Merchant Shipping Act, 1894, in the same manner, and to the same extent, as if he were the registered owner?

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Bargrave Deane J. has decided that the charterer, not being included in the word "owner," did not come within the terms of these sections, and was not entitled to the benefits they confer, and the Court of Appeal has upheld his decision.

With all respect to the learned judge and to the learned Lords Justices who followed him, I think the construction they put on these sections was somewhat narrow, and the conclusion at which they arrived erroneous. The following sections of the statute, sixteen in number—namely, ss. 111, 127, 134, 143, 175; s. 183, sub-s. 1; s. 189, sub-s. 4; s. 195, sub-s. 2; s. 197, sub-ss. 5 and 6; s. 198, sub-s. 4; s. 207; s. 221, sub-s. (*a*); ss. 224, 226, 235; s. 253, sub-s. 3, in addition to some others not necessary to enumerate—deal with the position of the owner *vis-à-vis* the master and crew of his ship, and regulate their respective rights and obligations. If these sections are to apply to a ship chartered under a charterparty such as that above mentioned—and it has not been suggested that they do not—then, in order that their requirements should not lead to absurd and irrational results, the word "owner," as used in them, must be construed to include a charterer by demise, having the entire control of the ship, as had the charterers in this case.

And in *Meiklereid* v. *West* (1) it was accordingly decided, as indeed might have been expected, that in the construction of the 169th section of the Merchant Shipping Act of 1854, which corresponds with the 143rd section of the Act of 1894, the word "owner" must be held to include a charterer by demise, who for the time being had, under a contract with the registered owner, possession and control of the ship, and hired and employed the master and crew.

Again, for stores ordered by the master of a ship chartered by demise, or for damage done to goods shipped in such a ship under bills of lading signed by him, the charterer is liable "as owner": *Frazer* v. *Marsh* (2); *Colvin* v. *Newberry*. (3) In *Baumwoll* v. *Furness* (4) Lord Herschell is reported to have expressed himself as follows: "The person who has the absolute right to the ship, who is the registered owner, the owner (to

(1) 1 Q. B. D. 428.
(2) (1811) 13 East, 238.
(3) 1 Cl. & F. 283.
(4) [1893] A. C. 8, 16, 17.

borrow an expression from real property law) in fee simple may be properly spoken of no doubt as the owner, but at the same time he may have so dealt with the vessel as to have given all the rights of ownership for a limited time to some other person, who during that time may equally properly be spoken of as the owner."

It is obvious, therefore, that in s. 78, sub-s. 3, imposing a penalty on an owner who stores goods in a space measured for propelling power, and in ss. 446 and 448, dealing with the loading of dangerous goods, the word "owner" must be construed to include charterer, even though the last-named section confers a privilege upon him, instead of imposing an obligation, as indeed do many of the sections first mentioned.

The same principle of construction must apply to s. 451, which deals with deck cargoes; ss. 452, 453, which provide for the precautions to be taken to prevent the shifting of grain cargoes; s. 458, which imposes on the owner an obligation to use all reasonable means to insure the seaworthiness of the ship; s. 460, which confers on the owner the right to recover from the Board of Trade damages for the detention, without reasonable or probable cause, of a ship alleged to be unseaworthy; s. 472, which deals with the removal of the master by the High Court of England or Ireland, Court of Session in Scotland, and elsewhere in the King's dominions by Courts of Admiralty, and confers on the owner the privilege of making the application for his removal.

Sect. 442, which imposes a penalty on the owner who permits his vessel to be overloaded so as to submerge in salt water the centre of the disc indicating the load line; s. 483, which provides for compensation to be paid to the owner out of the wages due to a seaman who is discharged; ss. 591 to 633, which deal with pilotage—the last-mentioned section conferring the privilege of exemption from liability for damage caused by the fault or incapacity of a qualified pilot while in charge; and last of all, and most important of all, s. 419, which requires that all owners and masters of ships shall obey the regulations to prevent collisions at sea and shall not carry or exhibit any lights, or use any fog signals other than such as are required

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by those regulations, and provides—(1.) that any infringement of these regulations by the wilful default of the master or owner shall make the person offending in respect of each offence guilty of a misdemeanour, and (2.) that in a case of collision, where the regulations have been infringed, the ship which has infringed them shall, unless it be proved that the departure from them was necessary, be deemed to have been in fault.

If, therefore, in these numerous sections—imposing obligations and conferring privileges upon the owner in relation to the crew which sails his ship, the shipper who puts his goods on board her, the crews and owners of other ships which navigate the same waters as his own, and therefore may be injured by collision with her—it is necessary to construe the word "owner" so as to include the charterer, it would seem but natural to conclude that the same construction should be given to the word "owner" in ss. 503 and 504, and the privilege these sections confer should be extended to the charterer.

It is contended, and apparently has been decided, that this cannot be done, for three reasons: (1.) Because in s. 289 and the following sections dealing with emigrant ships the words "owner or charterer" are used, shewing, it is contended, that when the Legislature wished to deal with the case of a charterer it knew how to select words apt for the purpose. This being a consolidation statute, it may well be that the language of the Acts, whose provisions were consolidated, was copied; but, however that may be, there is no force in the argument, since it is apparent that the same Legislature, on the same occasion and in the same statute, must be held to have intended to include the charterer in the description "owner" in the several sections already referred to. (2.) Because of the history of this legislation limiting liability and of the recitals and provisions contained in some of the earlier statutes. That history is given in Marsden on Collision, 5th ed. ch. 7, p. 145. The earliest Act, 7 Geo. 2, c. 15, appears to have been passed in consequence of the decision in *Boucher* v. *Lawson* (1): see Buller J. in *Yates* v. *Hull* (2), in which the shipowner was held liable for the loss of a case of bullion put on board his ship and stolen by

(1) Cas. temp. Hardw. 85. (2) (1785) 1 T. R. 73, at p. 78.

his servant the master. It was followed by the 26 Geo. 3, c. 86, then by 53 Geo. 3, c. 159, and ultimately by the 17 & 18 Vict. c. 104. It is quite true that the object of these statutes, as expressed in their preambles, is to increase the number of British ships and cause "merchants and others to be interested in them"; but I should think that few things would tend more to encourage men to build ships than the securing to them facilities for hiring their ships out under charterparties, and few things would tend more to induce charterers to hire than that the protection from serious or overwhelming loss which the registered owner enjoys should be extended to the hirer. To extend that protection to charterers would, therefore, forward the policy of these Acts, not thwart it; and I see nothing in them to necessitate the conclusion that charterers by demise may not be well treated as coming within the description of "owners" within the meaning of these statutes. Besides, it must be borne in mind that the protection is now extended to the owners of foreign ships. I therefore think that there is nothing in this contention.

And (3.) because the words "The owner of a British sea-going ship, or any share therein," are used in the 502nd section, and the words "the owner of any sea-going ship, or any share therein," are used in the 503rd; the use of the words "or any share therein" indicating, to use the words of Fletcher Moulton L.J., that "the Legislature were thinking of the real owners, and not of the lessee."

But it would have been necessary to introduce here the words "any share therein," whether the word "owner" includes a charterer by demise or not, because each part-owner, where there are more owners than one, being one of the joint employers of the actual wrong-doers, is liable for the entire damage done; and if the damage was caused through the "actual fault" or with "the privity" of one or more of the part-owners sued, then, since all were not blameless, the liability of none of them could but for those words be limited, though some of them were blameless and came within the equity of the statute. The words "or any share therein" were introduced, in my opinion, for the protection of these blameless persons. I am quite unable,

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however, to see how the presence of these words in these sections shews that the Legislature never meant to protect a person with the special and temporary ownership possessed by a charterer by demise, who was as meritorious an object of protection as the registered owner.

The actual "fee simple" owner becomes liable, not because he is owner, but because he is the master or employer of the persons whose negligence causes the damage: per Lord Cairns, *River Wear Commissioners* v. *Adamson* (1), and Lord Blackburn, *Simpson* v. *Thompson.* (2) The charterer by demise becomes liable precisely for the same reason, and on the same ground. And I see no reason why the word "owner" or "owners," when used in ss. 503 and 504, should not be construed, as it must be construed in many other sections, so as to include a charterer by demise. I therefore think the decision of Bargrave Deane J. and the Court of Appeal was wrong and should be reversed, and that this appeal should be allowed, with appropriate costs in the circumstances of the case.

LORD COLLINS. I agree.

Order of the Court of Appeal reversed, with a declaration that the appellants can claim the limitation of liability prescribed by s. 503 *of the Merchant Shipping Act,* 1894. *The appellants to pay the respondents' costs in relation to the appellants obtaining a limitation decree in the Admiralty Division; the respondents to pay to the appellants any extra costs in the said Court occasioned by the action of the respondents in opposing the application for the decree, and the appellants' costs in the Court of Appeal and in this House.*

Lords' Journals, February 28, 1908.

Solicitors: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool; Pritchard & Sons, for Batesons, Warr & Co., Liverpool.*

(1) (1877) 2 App. Cas. 743, 751. (2) (1877) 3 App. Cas. 279, 293.

[HOUSE OF LORDS.]

NORTH AND SOUTH WALES BANK, LIMITED . . . . . } Appellants; H. L. (E.) 1908 March 5.

AND

MACBETH . . . . . Respondent.

NORTH AND SOUTH WALES BANK, LIMITED . . . . . } Appellants;

AND

IRVINE . . . . . Respondent.

Cheque—Forged Indorsement—Payee—"Fictitious or non-existing Person"—Belief or Intention of Drawers—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 7, *sub-s.* 3.

Where a cheque is drawn by a real drawer who designates an existing person as the payee and intends him to receive the proceeds, the payee is not "a fictitious person" within the Bills of Exchange Act, 1882, s. 7, sub-s. 3.

The drawer of a cheque induced by the fraud of W. drew the cheque to the order of K., an existing person, and intended him to be the payee. W. forged K.'s indorsement, and paid the cheque into his own account at his bankers, who received the amount of the cheque from the drawer's bank:—

Held, that the drawer could recover the amount of the cheque from W.'s bankers.

Decision of the Court of Appeal, [1908] 1 K. B. 13, affirmed.

The facts material to these two appeals, which were heard together, are stated in the judgments of Lord Loreburn L.C. Bray J. gave judgment for the plaintiff in each case (Macbeth, the respondent in the first appeal (1), and Irvine, the respondent in the second) for the respective amounts of the two cheques. These decisions were affirmed by the Court of Appeal (Lord Alverstone C.J., Buckley and Kennedy L.JJ.). Hence these appeals.

Feb. 13, 14. *Isaacs, K.C.*, and *Maurice Hill* (*Hugh Beazley* with them), for the appellants in both appeals. In the

(1) [1906] 2 K. B. 718.

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circumstances the cheque was a cheque drawn in favour of a "fictitious or non-existing person" within the meaning of the Bills of Exchange Act, 1882, s. 7, sub-s. 3, and therefore became a cheque payable to bearer. The case is governed by *Bank of England* v. *Vagliano*. (1) The word "fictitious" is not synonymous with "non-existing." Petridi in that case was an existing and known person but was treated by most of the Law Lords as a fictitious person. This was the basis of the judgments of Lords Halsbury and Herschell. Lord Macnaghten says (2) that before the Act, in the case of a fictitious person, the knowledge of the fiction by the acceptor was a material element, and Lord Herschell states that the law has been altered in this respect by the Act. He says (3): "It is not open to question that it" (the Act) "was intended to alter and did alter the law in certain respects." *Clutton* v. *Attenborough* (4) is identical with the present case, save that the payee there was a wholly imaginary person. In that case Lord Shand considered that "fictitious" and "non-existing" were the same thing. *Vinden* v. *Hughes* (5), which Warrington J. attempted to distinguish from *Vagliano's Case* (1), was wrongly decided.

Horridge, K.C., and *Leslie Scott*, for the respondent in each appeal. Kerr was an existing person known to all the persons interested, and by no stretch of language could have been described as "fictitious" or "non-existing." To make the subsection applicable there must be no intention to create a real payee. If the person named in the bill as payee is a real person, he cannot afterwards become unreal. In *Vagliano's Case* (1) the House did not consider the papers to be bills at all; but the respondents were estopped from denying their validity. Moreover, the difference must be remembered between cheques and bills of exchange. The latter pass from one holder to another, in perhaps a long series, whereas the purpose of a cheque is to transfer money from the drawer to the particular person named in the cheque: see Lord Macnaghten in *Vagliano's Case*. (6) Moreover, by s. 24 a forgery is a nullity unless an estoppel can be

(1) [1891] A. C. 107.
(2) Ibid. at p. 160.
(3) Ibid. at p. 145.
(4) [1897] A. C. 90.
(5) [1905] 1 K. B. 795.
(6) [1891] A. C. 107, at p. 158.

established; and here none is alleged. Neither *Vagliano's Case* (1) nor *Clutton's Case* (2) has any application.

Isaacs, K.C., in reply.

The House took time for consideration.

MACBETH'S CASE.

March 5. LORD LOREBURN L.C. My Lords, the reasons for deciding this case in favour of the plaintiff are stated so clearly in the judgments of Bray J. and of the Court of Appeal that I need not say much in moving your Lordships to dismiss the present appeal.

The plaintiff was induced by the fraud of William White to draw a cheque for 11,250*l.* in favour of one T. A. Kerr or order. T. A. Kerr was an existing person, and when the plaintiff drew the cheque in his favour he intended that Kerr or his transferee should receive the money. White obtained the cheque, forged Kerr's endorsement, paid the cheque into his own account at the defendants', the North and South Wales Bank, and they, on presenting it to the plaintiff's bank, received payment.

It was not, in these circumstances, disputed that the defendants were liable to the plaintiff unless they could shew that the payee of the cheque, T. A. Kerr, was a "fictitious" person within the meaning of the Bills of Exchange Act, s. 7, sub-s. 3.

I adopt the language of Bray J.: "It seems to me that when there is a real drawer who has designated an existing person as the payee, and intends that that person should be the payee, it is impossible that the payee can be fictitious."

If the argument for the appellants were to prevail, namely, that the payee was a fictitious person because White (who was himself no party to the cheque) did not intend the payee to receive the proceeds of the cheque, most serious consequences would ensue. It would follow, as it seems to me, that every cheque to order might be treated as a cheque to bearer if the drawer had been deceived, no matter by whom, into drawing it. To state such a proposition is to refute it. Yet nothing short of this could establish the appellants' contention.

(1) [1891] A. C. 107. (2) [1897] A. C. 90.

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As to the authorities, I agree with the Court of Appeal in thinking that neither *Vagliano* v. *Bank of England* (1) nor *Clutton* v. *Attenborough* (2) governs the present case. I will not discuss the former of those authorities beyond saying that it was not a case in which the drawer intended the payee to receive the proceeds of the bill. And in the latter authority the payee was a non-existent person whom no one either could or did mean to be the recipient of the proceeds of the cheque.

That being so, I think this appeal should be dismissed with costs.

LORD ROBERTSON. My Lords, we have been frequently told that the question before us is, What is the meaning of the word "fictitious"? It would be more accurate to say that the question is, What is the meaning of the words "fictitious person"? And I cannot help thinking that, at least in the present case, this has not been sufficiently attended to. Dr. Johnson, it is true, gives "counterfeit, false, not genuine" as one meaning of the word "fictitious"; but the illustration given, namely, "fame," shews that this meaning is applicable to things; he gives another, "feigned, imaginary," and the illustration given is "The human persons are as fictitious as the airy ones." This last is the sense applicable to persons, and "person" is the word with which we have to deal.

Now I hope I shall not be thought too crude if I say that the present question seems to me to be decided, once we know that T. A. Kerr, so far from being a "feigned or imaginary" person, was a living man, in business, known to the drawer of the cheque, and intended by him to receive the proceeds.

All that has been said about the cheque does not seem to me to touch this question. The argument, if good for anything, brings within this section all bills obtained by fraud, and credits the Legislature with expressing this by describing the payee as a fictitious person. I am unable to adopt this conclusion.

Vagliano's Case (1) is so entirely different in its facts as to be inapplicable to that before us.

(1) [1891] A. C. 107. (2) [1897] A. C. 90.

LORD COLLINS. My Lords, I agree.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, March 5, 1908.

IRVINE'S CASE.

LORD LOREBURN L.C. My Lords, in this appeal two points were raised by Mr. Isaacs.

The first is identical with that raised in the case of *North and South Wales Bank* v. *Macbeth*, and ought not, in my opinion, to prevail for reasons I have already stated.

The second point made by the appellants is that, assuming the Court of Appeal to be right in giving judgment for the plaintiff, yet the damages ought not to be 2300*l.*, but only 120*l.*

Irvine, the plaintiff, was induced by the fraud of one White to sign a cheque for 2300*l.*, payable to John Davies or order. He intended that Davies, who was a real person well known to all concerned, should receive the money. White forged Davies' name, and procured his bankers, the defendants the North and South Wales Bank, to present it, and obtain payment from the plaintiff's bankers. For this the defendants are liable to the full extent of 2300*l.* unless the following additional fact can in part relieve them.

White advanced to the plaintiff 2180*l.* to enable the plaintiff to meet this cheque for 2300*l.* So the plaintiff, in fact, has only lost, up to the present time, the difference, namely, 120*l.* And the defendants urge that he can recover from them nothing beyond this actual loss. I do not think so. I agree with Buckley L.J. that the whole 2300*l.* paid to the defendants was paid out of Irvine's money at his own bankers. Where he got that money is irrelevant. He may have to account for 2180*l.* of it to White's trustees. I do not know whether it will be so or not. It will depend on the rights between plaintiff and White's trustees. But I see nothing that can entitle the defendants to stand in the shoes of White's trustees and claim against the plaintiff what, in effect, is a set-off, arising out of an indebtedness

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of the plaintiff, not to themselves, but to White. If any case could be cited in favour of the defendants' contention, it might be necessary to contrast it with other authorities. But I think there is no such case, and that the law is plain.

I therefore move your Lordships that the appeal be dismissed with costs.

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LORD ROBERTSON. My Lords, I concur.

LORD COLLINS. My Lords, I concur.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, March 5, 1908.

Solicitors: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool; Walker, Son & Field, for Weightman, Pedder & Weightman, Liverpool.*

[HOUSE OF LORDS.]

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March 6.

MAYOR, &c., OF WESTMINSTER . . . . APPELLANTS;

AND

GORDON HOTELS, LIMITED . . . . . RESPONDENTS.

Metropolis Management Acts—Removal of Refuse—Hotel—Trade Refuse—Dispute between Occupier and Sanitary Authority—Decision of Petty Sessional Court "shall be final"—Appeal by Special Case—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 33—*Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 33, *sub-s.* 2.

In any dispute between the occupier of premises and the sanitary authority as to what is to be considered trade refuse, the decision of the magistrate under s. 33, sub-s. 2, of the Public Health (London) Act, 1891, is final, and no appeal will lie to the High Court, notwithstanding the Summary Jurisdiction Act, 1879, s. 33, which provides for the stating of a case upon a point of law upon the application of any person aggrieved by a decision of a magistrate.

Decision of the Court of Appeal, [1907] 1 K. B. 910, affirmed.

THE circumstances under which this appeal arose are stated in the report of the decision of the Court of Appeal.

March 5, 6. *Macmorran, K.C.*, and *Courthope Munroe*, for the appellants.

Danckwerts, K.C., and *R. Cunningham Glen*, for the respondents, were not heard.

LORD LOREBURN L.C. My Lords, the grounds of this appeal have been very clearly stated to us in the argument, but I see no reason for any dissent from the judgment of the Court of Appeal.

The Act of 1891 declared that the decision of the magistrate should be final, and I do not think that can be qualified by the earlier Act of 1879 providing for the stating of a case. If the order of the dates had been inverted the matter might have borne a different aspect.

LORD ASHBOURNE. My Lords, I entirely agree with what the Lord Chancellor has said.

LORDS MACNAGHTEN, JAMES OF HEREFORD, ROBERTSON, and ATKINSON concurred.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, March 6, 1908.

Solicitors: *Allen & Son; Stanley, Woodhouse & Hedderwick.*

[HOUSE OF LORDS.]

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March 6.

MACBETH & CO., LIMITED . . . . . APPELLANTS;

AND

MARITIME INSURANCE COMPANY, LIMITED . . . . . RESPONDENTS.

Insurance (Marine)—Constructive Total Loss—Test—Policy on Ship—Cost of Repair—Value of Wreck.

In determining the question whether a ship seriously damaged by perils insured against can be treated as a constructive total loss, the test is whether a prudent uninsured owner would repair her having regard to all the circumstances. In this calculation the assured is entitled to add the break-up value of the ship to the estimated cost of repairs.

Angel v. *Merchants' Marine Insurance Co.*, [1903] 1 K. B. 811, overruled.

THE ship *Araucania*, belonging to the appellants, was insured in a time policy by the respondents, valued at 12,000*l.*, the insured value to be taken as the repaired value in ascertaining whether the vessel was a constructive total loss. The ship was driven in October, 1905, by weather on to rocks near Ardrossan. Notice of abandonment was given. In an action by the appellants against the respondents upon the policy evidence was given, which was not disputed, that the ship could be sold unrepaired for upwards of 3000*l.* Walton J. found that the cost of the repairs necessary to make her as good as she was before the casualty would not have amounted to more than 11,000*l.*, and that, if the value of the wreck was to be taken into consideration, there was undoubtedly a constructive total loss; but, holding himself bound by *Angel* v. *Merchants' Marine Insurance Co.* (1), he decided that the value of the wreck was not to be taken into account, and gave judgment for the respondents. This decision was affirmed by the Court of Appeal (Lord Alverstone C.J., Buckley and Kennedy L.JJ.) on the same ground. Hence this appeal.

Feb. 11, 13. *Scrutton, K.C.*, and *Bailhache* (*D. Stephens* with them), for the appellants. This is virtually an appeal from *Angel*

(1) [1903] 1 K. B. 811.

v. *Merchants' Marine Insurance Co.* (1), which was the first decision that the value of the wreck, in estimating whether there has been a constructive total loss, is not to be taken into account. This is a matter of business, and must be judged on business principles, and one of the elements must be the wreck itself. Is it worth while to repair the ship? If the value of the wreck and the cost of repairs taken together exceed the value of the ship so repaired, it would be more profitable to treat the vessel as a total loss than to repair her. The test laid down in the earlier authorities is what would be done by a prudent uninsured owner. This was the test applied in *Young* v. *Turing* (2) by Lord Abinger C.B., in what is called a "dictum," in *Angel* v. *Merchants' Marine Insurance Co.* (1) It has been restated or implied in many subsequent cases. It was approved in this House in *Irving* v. *Manning* (3), and applied, totidem verbis, in *Fleming* v. *Smith* (4); again in *Benson* v. *Chapman* (5); and by Lord Cranworth in *Scottish Marine Insurance Co. of Glasgow* v. *Turner*. (6) It is alleged that the doctrine of the prudent uninsured owner was abandoned in *Moss* v. *Smith*. (7) It was not there applied because it did not really arise, as the question was one of freight, and not of abandonment. The decision of this House in *Rankin* v. *Potter* (8), in which the judges summoned to advise the House differed, was in effect an approval of the doctrine, which is also supported by *Kaltenbach* v. *Mackenzie* (9), *Aitchison* v. *Lohre* (10), and *The Blairmore*. (11) The doctrine is implied or suggested in *Kemp* v. *Halliday* (12), where it was held that in determining whether or not the ship was a constructive total loss the amount of general average which would be contributed by the cargo must be taken into account, and the cost of raising the ship calculated as reduced by that amount. *Grainger* v. *Martin* (13), which is more lucidly reported in the *Law Journal* than elsewhere, is exceptional, as the market

(1) [1903] 1 K. B. 811.
(2) (1841) 2 Man. & G. 593.
(3) (1847) 1 H. L. C. 287.
(4) (1848) 1 H. L. C. 513.
(5) (1849) 2 H. L. C. 696.
(6) (1853) 1 Macq. 334.
(7) (1850) 9 C. B. 94.
(8) (1873) L. R. 6 H. L. 83.
(9) (1878) 3 C. P. D. 467.
(10) (1879) 4 App. Cas. 755.
(11) [1898] A. C. 593.
(12) (1866) L. R. 1 Q. B. 520.
(13) (1862-3) 31 L. J. (Q.B.) 186; 2 B. & S. 456; in Ex. Ch. 4 B. & S. 9.

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value of the ship was far less than its value to the owner. The value of the wreck was taken into account in three recent decisions—by Barnes J. in *Marten* v. *Sydney Lloyds* (1), by Phillimore J. in *Beaver Line* v. *London and Provincial Marine Insurance Co.* (2), and by Walton J. in *Wild Rose Steamship Co.* v. *Jupe.* (3)

J. A. Hamilton, K.C., and *F. D. Mackinnon*, for the respondents. The question whether or not a vessel is a constructive total loss turns upon her being or not being repairable in a business sense—that is, at a cost not exceeding her repaired value. It is not a matter of comparative speculation whether a shipowner can or cannot achieve for himself a better pecuniary result by selling the ship unrepaired than by repairing her. *Angel* v. *Merchants' Marine Insurance Co.* (4) was followed in *The Alangueta* (5), and those decisions are correct. The principle involved in these cases is virtually enacted in the Marine Insurance Act, 1906, s. 60, sub-s. 1, where a "constructive total loss" is said to happen when the subject-matter "could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred." The same principle is stated with respect to goods in s. 60, sub-s. 2 (iii.). In the recent cases referred to on behalf of the appellants evidence was admitted, but the opinions of the judges not expressed. The doctrine of the prudent uninsured owner—the φρόνιμος of Aristotle—seems to have been first stated in *Cambridge* v. *Anderton* (6), but it is not clear that it was really acted upon, as, apart from the value of the wreck, the cost of repairs would have exceeded the value of the repaired ship. The question in *Young* v. *Turing* (7) involved a comparison of values under the Dutch and the English registers, and Lord Abinger's words were not necessary to the decision. The dictum itself is not exhaustive or conclusive, and its application must vary with circumstances. The contract of insurance is one of indemnity only, not of profit, though incidentally in a valued policy the owner may make a

(1) *Times*, Dec. 19, 1896.
(2) (1899) 5 Com. Cas. 269.
(3) (1903) 19 Times L. R. 289.
(4) [1903] 1 K. B. 811.
(5) *Shipping and Mercantile Gazette*, March 19, 1904.
(6) (1824) 2 B. & C. 691.
(7) 2 Man. & G. 593.

profit. In *Irving* v. *Manning* (1) the real, and not the insured, value was regarded; and the value of the ship as a wreck was not the guiding fact in *Fleming* v. *Smith* (2), *Grainger* v. *Martin* (3), or in *Rankin* v. *Potter*. (4) Nothing is said of it in *Fleming* v. *Smith* (2); nor is *The Blairmore* (5) more favourable to the appellants, the decision being only that the underwriter, by his intervention, could not convert, in the circumstances of the case, a constructive total loss into a partial loss.

Scrutton, K.C., in reply.

The House took time for consideration.

March 6. LORD LOREBURN L.C. My Lords, in this case the ss. *Araucania* was insured by the respondents in a valued policy for 12,000*l.*, free of particular average, and with a condition that in reckoning whether or not there should be a constructive total loss the repaired value should be taken at the valuation of 12,000*l.*

She went ashore. The learned judge has found, and it is not disputed, that the cost of repairing was 11,000*l.* So if that alone is to be considered she was not a constructive total loss. But she would be so if to the cost of repairing the selling value of the wreck were to be added. Whether or not it ought to be added is the question before the House.

The learned judges, both in the Court of first instance and in the Court of Appeal, answered that question in the negative, not upon any view of their own, but in deference to the decision of *Angel* v. *Merchants' Marine Insurance Co.* (6), pronounced by the Court of Appeal in 1903. In *Angel's Case* (6) one of the Lords Justices expressed himself on this point in terms of dissent from his colleagues.

This question admits of ready answer as soon as it is ascertained what is the true test by which a Court is to be guided. Really the choice lies between two. One is that a ship has become a constructive total loss if the cost of repairing her

(1) 1 H. L. C. 287.
(2) 1 H. L. C. 513.
(3) 31 L. J. (Q.B.) 186; 2 B. & S. 456; in Ex. Ch. 4 B. & S. 9.
(4) L. R. 6 H. L. 83.
(5) [1898] A. C. 593.
(6) [1903] 1 K. B. 811.

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would exceed her value when repaired. The other is that she has become so when a prudent uninsured owner would not repair her having regard to all the circumstances. If the former test be adopted, then this appeal must be dismissed, because the cost of repairs here is 11,000*l.* and the repaired value is 12,000*l.* If the latter test be adopted, then the appeal must be allowed; for no sensible man would have repaired this ship if he could have made a better thing of it by selling her as a wreck, and it is found that he could have done so.

If this were an open question, there seems to me ground for arguing that the former is the sound view.

But I think this is not really an open question, notwithstanding the recent decision in *Angel's Case*. (1) I will not enter upon a criticism of the authorities. I have had the advantage of seeing in print the opinion of Lord Collins, who fully discusses them, and I agree in his conclusion.

When once the test of what a prudent uninsured owner would do, whether he would sell the ship where she lies or repair her, is admitted, it follows that the value of the ship where she lies must enter into the calculation. And this test has been laid down repeatedly by many high authorities over a long period of time. I think it was too late to disturb it in 1903.

I will merely add that in my opinion the rule can only apply where there has been a wreck or something equivalent to a wreck. If an owner tried to treat as a constructive total loss such a case as was put in argument, of a vessel worth 5000*l.* as she lay damaged in harbour after a storm, but which would cost 6000*l.* to make her fit to take the sea, and would then be worth only 10,000*l.* as repaired, he would fail. Among other reasons, the loss would not be by perils of the sea.

Accordingly I am of opinion that the appeal should be allowed.

LORD ROBERTSON. My Lords, I find it impossible to refuse the demand of the appellants.

When a ship has been damaged during a voyage the practical question is, Shall she be repaired or abandoned? The pros and

(1) [1903] 1 K. B. 811.

cons. on this question are, as it seems to me, of a commercial and pecuniary nature, and necessarily so from the standpoint of the person whose pocket is affected. It follows that a balance-sheet has to be drawn up, shewing what is gained and what is lost by repairing on the one hand and by abandoning on the other. Now I am unable to see how such a balance-sheet can be accurate unless it includes the corpus of the damaged ship. The curious part of the respondents' case is that they do include it, but only on one side of the account, for it is part of the value of the ship if repaired. I can see no reason why it should not enter the account on the opposite hypothesis that the ship is not repaired, and it would unquestionably do so, as matter of business, in determining the decision of any rational man who had to consider the question.

It was urged, however, that in a contract of insurance what is insured is the ship as a thing, and not in its relation to the commercial enterprises of its owner. While, as presented, this sounds plausible, it is fallacious. What is insured is the life of the ship as a living instrument of commerce, and the owner is not credited with any romantic attachment to the ship, so that he will keep life in her at all costs and to the sacrifice of the commerce of which she is an instrument.

Again, there is nothing in the argument that the wrecked ship, if abandoned, may after all be bought and resuscitated and resume activity in other hands. This merely means that a wrong judgment was come to on the question of fact, and that the cost of repair was well-spent money, instead of, as was thought, ill-spent money. But whichever view be taken of the present controversy, some conclusion must be come to in each case on the question whether it is worth while to repair; and the argument necessarily assumes in any case in hand that the conclusion come to is right.

In what I have said I have proceeded on the assumption that, in ascertaining whether there is a constructive total loss, one has to hold an inquest, as it were, and consider whether the ship shall be repaired or shall be abandoned. I do so, first of all, because I do not see how there can be such a thing as a constructive total loss without this being done; and, secondly, because

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it has for long been laid down by very high authorities that the criterion is the presumable judgment of the owner, on the footing of his being uninsured and acting in his own interests. I desire to say that my judgment is given on principle, and not merely on authority.

LORD COLLINS. My Lords, this is virtually an appeal from the judgment of the Court of Appeal in *Angel* v. *Merchants' Marine Insurance Co.* (1), and raises the question whether, in determining whether a ship seriously damaged by perils insured against can be treated as a constructive total loss, the owner is entitled to add the break-up value of the wreck to the estimated cost of repairs. The circumstances which will justify an owner in abandoning his vessel when he elects not to repair her are thus stated in Arnould on Marine Insurance, 5th ed. p. 1003: "On that question," he says, "the rule of law is clearly established but variously expressed. By Mr. Justice Blackburn it is said, 'the question between the assured and the underwriters on ship is whether the damage sustained may be so far repaired as to keep it a ship though not perhaps so good a ship as it was before without expending upon it more than it would be worth.' By Chief Justice Tindal it is said to be that where the damage to the ship is so great as that the owner cannot put her in a state of repair necessary for pursuing the voyage insured, except at an expense greater than the value of the ship, he is not bound to incur that expense, but is at liberty to abandon and treat the loss as a total loss. The same thing, as more briefly expressed by Mr. Justice Patteson, is thus: 'Would a prudent owner uninsured repair?' or rather, said Baron Wilde, 'Would he sell unrepaired?'"

On the same subject Blackburn J. thus expresses himself in *Kemp* v. *Halliday* (2): "The question whether it is practicable to save the subject-matter within the meaning of the phrase as explained by Mr. Justice Maule in *Moss* v. *Smith* (3) has been differently left to the jury. In *Gardner* v. *Salvador* (4) Mr. Justice Bayley left it to the jury to say whether by

(1) [1903] 1 K. B. 811.
(2) 34 L. J. (Q.B.) 233, at p. 245.
(3) 9 C. B. 94, at p. 103.
(4) (1831) 1 Moo. & R. 118.

means within the reach of the captain, which he could reasonably use, the ship could be saved. The mode of putting the question, which has been generally adopted, has been to ask whether a prudent uninsured owner would have done it. In *Rosetto* v. *Gurney* (1) the Court, approving of what has been said by Mr. Justice Maule in *Moss* v. *Smith* (2), state the rule thus: 'If the damage is repairable the loss is total or partial according to circumstances. If the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, and therefore as between the underwriters and the assured impossible.' The three modes of expression *all seem to me to convey the same idea.* No means which would cost more than the object is worth can be considered reasonable, and a prudent uninsured owner would not adopt them, but if the means within his reach would cost less than the object is worth, a prudent uninsured owner would adopt them rather than suffer the thing to perish, though a prudent insured owner, especially if insured in a valued policy, would probably act otherwise if the law permitted him by so doing to recover from the underwriters for a total loss." A few lines further on he continues: "In considering whether it was reasonable to raise the ship and cargo in the present case, I think that every circumstance tending to increase or diminish the necessary outlay, and every circumstance tending to increase or diminish the benefit to be derived from that outlay, ought to be taken into account, and amongst those the fact that cargo would be saved by that operation, and would contribute to the expense seems to me a very important element." As appears, then, from the passages cited, the test usually applied at that time (1865) was what would a prudent uninsured owner do in the circumstances, and the same test has continued to be applied ever since, and was approved in the House of Lords as late as 1898 in *Sailing Ship Blairmore Co.* v. *Macredie.* (3)

First, then, dealing with the specific issue arising on this appeal, apart from authority, what part, if any, ought the break-up value of the hull to have as a factor in the calculation

(1) (1851) 11 C. B. 186. (2) 9 C. B. 94, at p. 103.
(3) [1898] A. C. 593.

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of the cost of bringing into existence a navigable ship as compared with the value of the ship when so produced?

Suppose the owner, finding himself in the possession of a ship, which, as the result of a sea peril, can be sold only at a break-up price, sells it, and suppose the purchaser elects to try the experiment of repairing her, and then reckons up the cost at which he has completed the whole operation, obviously he would have to count the cost at which he had bought the wreck. Why is not the owner in the like position if, instead of selling the wreck, he has applied the materials to be used in bringing into existence a navigable ship? He owned materials which had a certain saleable value, and which he was free to dispose of as he chose; instead of realizing their value he has utilized them in the process of turning the wreck into a navigable ship. Why is their saleable value not equally a factor in the calculation of the cost at which he brought into being a navigable ship? It seems to me that no prudent uninsured owner could be expected to leave out of his calculation the realizable value of the wreck. The above reasoning assumes throughout that the break-up value only of the wreck can be introduced into the calculation. Lord Campbell so treats it in *Fleming* v. *Smith* (1), when he says, "if a prudent uninsured owner would not have repaired the vessel, but would have sold it *to be broken up*, that amounts to a total loss." To assume that the wreck has a saleable value as a ship would be to accept an hypothesis inconsistent with the assumption on which a constructive total loss is based, for the existence of such a market value is inconsistent with the hypothesis that no prudent uninsured owner would repair, since we cannot assume that the purchasers are less prudent than the hypothetical uninsured owner; and, since they are prepared to give more than a break-up price for the wreck, it may be presumed that it is because they see their way to making it navigable at a cost which it will be worth while to incur.

These being the general considerations underlying the case, it remains to consider the state of the authorities when *Angel* v. *Merchants' Marine Insurance Co.* (2) was decided. There are

(1) 1 H. L. C. 513, at p. 534. (2) [1903] 1 K. B. 811.

very few instances in which the precise point raised here was discussed. The most important is the case of *Young* v. *Turing* (1), which contains a clear expression of opinion directly in point. There, on a claim as upon a total loss, Tindal C.J., who had tried the case, in summing up had told the jury that in considering whether the loss was partial or total they ought to look at "all the circumstances attending the ship," and to judge whether under all those circumstances a prudent owner, if uninsured, would have declined to repair the ship. It was proved that the ship as she lay "*to sell for the purpose of being broken up*" (2) was worth about 700*l.* On a bill of exceptions to this direction Lord Abinger, in delivering the unanimous judgment of the Court of Cam. Scac., thus expressed himself: "The Lord Chief Justice has laid down the usual and recognized rule, 'Whether under all the circumstances attending the ship a prudent owner, if uninsured, would have repaired the vessel.' Now to the value of the repairs must be added her value as she lay in the dock; that is to 4615*l.* (the estimated cost of repairs) must be added 700*l.*, making 5315*l.* as the cost," that is, of the repairs. He therefore clearly treats the break-up price of the wreck as one of the factors to be reckoned in the estimated cost of reparation by the uninsured owner. This weighty utterance was put aside in *Angel's Case* (3) as a mere dictum of Lord Abinger, and the same view was pressed upon us here. But whether it be a dictum or a decision, it has the authority, not of Lord Abinger alone, but of the Cam. Scac., which must have consisted of at least five, and probably of seven, judges (their names do not appear in the report) drawn from the Courts of the Queen's Bench and Exchequer, not to mention Tindal C.J., whose direction was upheld. But is it fair to say that this pronouncement in its context was merely an obiter dictum? I think not. The learned judge had begun by overruling the first exception, which complained of the direction that the value in the policy was immaterial and might be disregarded. He then addresses himself to what later on (4) he describes as "the substantial fact," i.e., that "her value when repaired is

(1) 2 Man. & G. 593.
(2) Ibid. at p. 595.
(3) [1903] 1 K. B. 811.
(4) 2 Man. & G. at p. 602.

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less than the cost." It is in the process of ascertaining this fact that he addresses himself at the outset to sift the evidence as to the cost of repairs in view of the Lord Chief Justice's direction, which was excepted to, that the jury should take into their consideration "*all the circumstances that affected the ship*," and that evidence of the break-up value of the ship was before them, as to which apparently there was no conflict. It must be remembered that the cost of repairs was not an agreed figure, but had been put variously by the English witnesses as 3530*l.* and 4615*l.* (1) On the other hand, the value of the ship, when repaired, was not an agreed figure, though the Dutch witnesses had put it at 2915*l.* The English evidence did not quantify it, but put it that if the ship could have got a British register it would have been worth more than the repairs. The jury had given a general verdict, not ascertaining the figures, and the contention of the defendants that the loss was partial only rendered an examination of the figures on either side of the account desirable. It seems to me impossible in these circumstances to say that the break-up value of the wreck was immaterial in the calculation. Clearly the learned judges who agreed in the judgment must have regarded it as material to the decision, and so likewise must the counsel in the case who caused the figure to be set out in the bill of exceptions.

The decision as to the effect of the value being named in the policy was affirmed in the House of Lords in *Irving* v. *Manning* (2), and the test there applied of the prudent uninsured owner in questions of constructive total loss approved. No adverse comment seems to have come from any source upon the passage here in question. If any such criticism had been made or thought applicable, it is very strange that in the unanimous opinion of the advising judges, said to have been prepared by Parke B. (3), where the test question is restated, having the expressions used in the judgment in *Young* v. *Turing* (4) necessarily and specially before them, they should not have drawn attention to the flaw, if such they deemed it, in the statement of what factors should be taken into consideration on the question "what a prudent uninsured owner would have done in

(1) 2 Man. & G. at pp. 595, 596.
(2) (1848) 6 C. B. 391.
(3) See 6 C. B. p. 422, n.
(4) 2 Man. & G. 593.

the state in which the vessel was placed by the perils insured against."

There are two other important expressions of judicial opinion directly in point, namely, that of Martin B. in advising the House of Lords in *Rankin* v. *Potter* (1), and that of Bramwell B. on the same occasion. (2) Both these statements are important, not merely as expressions of opinion by specially competent authorities, but as evidence of what was regarded as settled law at that time. They state the proposition, which is that involved in this case, as though it stood outside controversy, needing no argument or exposition; and they might well do so, for the law laid down on this subject in *Young* v. *Turing* (3) had, so far as appears, never been judicially questioned up to that time. Nor is it fair in this case either to dismiss these statements as mere obiter dicta. It is true the learned judges were only advising the House and not deciding the question before it, but it was essential to their argument to establish a total loss of the ship as bringing about a total loss of the freight, as to which the question of abandonment arose for decision in the House of Lords, and on the figures quoted (1) the proposition affirmed was vital to their conclusion. I do not think it necessary to refer to the observations of Lord Blackburn in *Aitchison* v. *Lohre* (4), which both sides equally relied on, but which do not appear to me to form a safe ground for an inference either way.

Since then, and before the decision of *Angel's Case* (5) in 1903, Barnes, Phillimore, and Walton JJ. had expressed opinions in favour of the appellants' contention in this case: see Arnould, 7th ed. p. 1268.

An attempt was made in the argument to suggest that the judgment of Maule J. in *Moss* v. *Smith* (6) had somehow altered the law as received up to that time, and that the test of what the prudent uninsured owner would do was no longer applicable since that decision; but this contention is quite inconsistent with the opinion of Blackburn J. set out in the

(1) L. R. 6 H. L. 83, at p. 145.
(2) Ibid. at p. 135.
(3) 2 Man. & G. 593.
(4) 4 App. Cas. 761.
(5) [1903] 1 K. B. 811.
(6) 9 C. B. 94.

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earlier part of this opinion, as well as with a series of later authorities wherein the old test has been treated as still applicable. Neither does there seem to be any force in the observation of Mathew L.J., that the increased facilities of communication in more modern times have made the test no longer applicable. No doubt the prudent uninsured owner has probably now more complete information at his disposal than he might have had formerly, but it is difficult to see what possible bearing this fact can have upon the principle involved. The more complete the information at his disposal the more accurate is his decision likely to be.

No case has been cited before *Angel's* (1) which in terms threw any doubt on the proposition affirmed in *Young* v. *Turing* (2) and in the other judicial opinions above cited, and the fact is that on investigation it will be found that the attack upon them rests, not on any judicial pronouncement with respect to them, but upon the views put forward in Mr. McArthur's book on Marine Insurance, published in 1885. These views have been adopted by the editors of the 7th edition of Arnould (1901), and found favour with the Lords Justices who formed the majority in *Angel's Case.* (1) The works of average adjusters are no doubt sometimes referred to in cases of this class; but Mr. McArthur's views are not apparently universally accepted by average adjusters, and, as he himself admits, are strongly opposed by an authority among them no less eminent than himself—Mr. Lowndes in his work on Marine Insurance—as well as by Mr. Gow (see McArthur, 2nd ed. 1890, p. 149, note (*g*); Lowndes, 2nd ed. s. 135; Gow, p. 150, note). It is to be noted that Mr. McArthur himself, as well as Mr. Lowndes, treats *Young* v. *Turing* (2) as a decision on the point. His chief arguments against the rule contended for are (1.) that it might apply to cases where the ship as it stood could be sold for more than break-up value, an hypothesis which is excluded, as has already been pointed out, by the terms of the rule itself; (2.) the analogy of the practice in cases of constructive total loss of cargo. But, as pointed out by Mr. Scrutton in argument and by Mr. Lowndes in his book (2nd ed. s. 133, note), the analogy between ship and cargo cannot, for special reasons, be made good.

(1) [1903] 1 K. B. 811. (2) 2 Man. & G. 593.

It remains to consider the passage inserted by the present editors in the 7th edition of Arnould. This is really an expansion of Mr. McArthur's view, but they are undoubtedly the originators of the notion that the passage cited from *Young* v. *Turing* (1) was "a dictum of Lord Abinger": see s. 1124. But underlying their whole position is the fallacy that where in the statement of the uninsured owner test the break-up value of the ship is not expressly mentioned it must be deemed to be excluded. In this way they claim as authorities in their favour every case where the proposition is stated in general terms, as, for instance, where Lord Watson, whom they quote, says, *Blairmore Sailing Ship Co.* v. *Macredie* (2): "In order to instruct a total constructive loss it must be shewn that a shipowner of ordinary prudence and uninsured would not have gone to the expense of raising and repairing the vessel, but would have left her at the bottom of the sea, because her market value when raised and repaired would probably be less than the *cost of restoration and repair*." They treat this as an authority inconsistent with the so-called dictum in *Young* v. *Turing*. (1) But what is there in the language here used to exclude the break-up value of the hull as a factor in the "cost of restoration and repair," to the carrying out of which it is by hypothesis applied?

They likewise treat as an authority in their favour the direction of Tindal C.J., "that where the damage to the ship is so great from the perils insured against as that the owner *cannot put her in a state of repair necessary for the pursuing of the voyage insured except at an expense greater than the value of the ship*, he is not bound to incur that expense, but is at liberty to abandon, and treat the loss as a total loss": *Benson* v. *Chapman*. (3) We are dealing, be it observed, with an owner deemed to be uninsured, whose vessel, which has never ceased to be his property, is lying at the bottom of the sea. She is a necessary factor in the formation of the repaired ship which it is proposed to bring into being; at whose cost, it may be asked, except that of her owner, is she contributed to the new entity which is to be formed by the process of reparation? It seems

(1) 2 Man. & G. 593.
(2) [1898] A. C. 593, at p. 603.
(3) (1843) 6 Man. & G. 792, at p. 810.

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to me that the direction of the Chief Justice, so far from asserting that the value of a necessary factor in the reparation is to be excluded from the computation of the cost of that operation, throws the onus upon those who contend for such an inference, to make it good. It is perhaps worth noting that, though the last edition of Arnould, for which he was himself responsible, was published as late as 1857—i.e., more than fifteen years after *Young* v. *Turing* (1) was decided—it remained unquestioned in that work through all editions up to the seventh, the first by the present editors, i.e., fifty years after the case was decided.

May it not be possible that "the misconception which has," according to these learned editors, "been allowed to find its way into the minds of some learned judges," and "partly due to the obiter dictum of Lord Abinger," may in truth have found its way elsewhere?

With regard to the decision in *Angel's Case* (2), I should perhaps add one word. Though Vaughan Williams L.J. did not formally differ, it was because he thought that the facts were not sufficiently ascertained to warrant him in differing from the learned judge below. But the whole train of reasoning in his judgment is directed to combating the proposition for which the respondents here contend. Stirling L.J. seems also to have felt some misgiving as to whether the question really arose upon the facts, but no doubt, on the assumption that it did, he, as well as Mathew L.J., answered it in favour of the now respondents. With the greatest possible respect to those learned judges, and for the reasons I have given, I feel compelled to differ from them. In my opinion the judgment should be for the appellants.

Order of the Court of Appeal and judgment of the King's Bench Division reversed, with costs here and below.

Lords' Journals, March 6, 1908.

Solicitors: *Holman, Birdwood & Co; Waltons, Johnson, Bubb & Whatton.*

(1) 2 Man. & G. 593. (2) [1903] 1 K. B. 811.

[HOUSE OF LORDS.]

OWNERS OF SS. GUILDHALL . . . . APPELLANTS; H. L. (E.) 1908

AND

GENERAL STEAM NAVIGATION COMPANY, LIMITED . . . . . RESPONDENTS. *April 7.*

THE GUILDHALL.

Admiralty—Collision—Thames By-laws, 1898, *art.* 46—*Risk of Collision.*

Two steam vessels proceeding in opposite directions, the one up and the other down the river Thames, came into collision:—

Held, as a question of pure fact upon the evidence, that the vessel proceeding down the river was alone in fault.

Decision of the Court of Appeal, [1908] P. 29, reversed and decision of Bucknill J. restored.

ABOUT noon December 16, 1906, the *Leeuwarden*, a steamship belonging to the respondents, while proceeding down the Thames came into collision with the steamship *Guildhall*, belonging to the appellants, which was proceeding up the river. The circumstances are fully stated in the report of the decision of the Court of Appeal. Bucknill J., who heard the case with the assistance of two Elder Brethren, held the *Leeuwarden* alone to blame. This decision was reversed by the Court of Appeal (Lord Alverstone C.J., Kennedy and Buckley L.JJ.), who had the assistance of two nautical assessors and held that the *Guildhall* was alone to blame and that art. 46 of the Thames By-laws applied. Hence this appeal, at which nautical assessors were present.

By art. 46 of the Thames By-laws, "When two steam vessels or two steam launches, proceeding in opposite directions, the one up and the other down the river, are approaching each other so as to involve risk of collision, they shall pass port side to port side."

Laing, K.C., and *Dawson Miller*, for appellants.

Aspinall, K.C., and *Bateson*, for respondents.

Laing, K.C., in reply.

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LORD LOREBURN, L.C. My Lords, in my opinion this appeal ought to prevail.

It is a peculiar circumstance in this case that the vessel whose evidence was disbelieved by the judge of first instance nevertheless prevailed in the Court of Appeal. The real point is whether when these two ships first sighted one another there was risk of collision and art. 46 applied. In my opinion art. 46 does not apply and there was not risk of collision. It was an ordinary case of two ships meeting while they were rounding a bend in the river. It seems to me that if the *Leeuwarden* had proceeded on a steady course and the *Guildhall* had steered the course which she actually did steer there would have been no collision, and no risk of collision.

As soon as the *Guildhall* saw the *Leeuwarden* she signalled that she was under a starboard helm. The *Leeuwarden* at that time had stopped her engines, and she immediately proceeded to port her helm and to go ahead. That brought about the collision, for which I think the *Leeuwarden* was solely to blame, as did Bucknill J., who with the assessors saw the witnesses, heard the evidence, and observed the course of the trial. I think he had the best opportunity of forming an accurate conclusion upon this, which was simply a question of fact.

LORD ASHBOURNE. My Lords, I entirely agree with my noble and learned friend on the woolsack that this appeal should be allowed.

I can see no difficulty or suggestion of any point of law; it seems to me to be a question purely of fact. In the Court of first instance Bucknill J. appears to have tried out the case fully and fairly, giving due weight and opportunity in dealing with all the evidence that was adduced before him, and he arrived at a conclusion as to the correctness of which he expressed no shadow of doubt. He submitted to the capable gentlemen who were advising him as nautical assessors certain questions which they answered without hesitation, and the answer was this, that the ship owned by the respondents was in fault and was not justified in porting, and that if that had not been done there would have been no accident or catastrophe, and the ships would have proceeded in safety.

Under these circumstances I do not think it necessary to say more than this, that I think the cases should be very rare indeed—I can conceive few cases where I would do it myself—where I would sanction or encourage an appeal on questions of fact which had been fully thought out and examined by the Court of first instance under circumstances like the present.

LORD MACNAGHTEN. My Lords, I agree.

LORD ROBERTSON. My Lords, I confess that I have read the judgment of the Lord Chief Justice with some surprise, because he accounts for the judgment which he proceeded to reverse by the circumstance that the Court had wholly disbelieved the case which the then appellants brought into Court. Now I must confess that I have the greatest difficulty in seeing how a case can survive and be given effect to by the Court of Appeal when the whole of the material evidence upon which it was based was disbelieved by the Court that heard it and that disbelief was assented to by the Court which reversed. It seems to me that the points upon which the case of the then appellants was disbelieved are essential to its success. They include, to begin with, the position of the *Guildhall*. If the position of the *Guildhall* is to be treated as an open question, it seems to me that the case goes by the board. The position of the two vessels must first be ascertained in order to know whether they were approaching one another with reasonable risk of collision. And accordingly I find in the judgments which are immediately under review sufficient ground for the reversal which your Lordship has proposed.

LORD ATKINSON. My Lords, I concur. I am clearly of opinion that when these vessels first sighted each other there was no risk of collision whatever; that they might have proceeded on their respective courses and passed with perfect safety; and that the collision was brought about by a rather ill-judged and unintelligent attempt of the captain of the *Leeuwarden* to pass port to port notwithstanding that he had got a distinct warning from the *Guildhall* that that vessel intended to continue under a starboard helm.

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I therefore think that the judgment of Bucknill J. was right and should be restored.

LORD COLLINS. My Lords, I agree.

Order of the Court of Appeal reversed and decree of Bucknill J. restored, with costs here and below.

Lords' Journals, April 7, 1908.

Solicitors: *Downing, Handcock, Middleton & Lewis, for Bolam, Middleton & Co., Sunderland; William Batham & Son.*

[HOUSE OF LORDS.]

H. L. (SC.) 1908 *Feb.* 6.

WEIR AND OTHERS . . . . . APPELLANTS;

AND

CRUM-BROWN AND OTHERS . . . . . RESPONDENTS.

Charity—Gift for Relief of indigent Bachelors and Widowers—Uncertainty.

A testator by his trust disposition and settlement directed his trustees to "employ the whole residue of my estate in instituting and carrying on a scheme for the relief of indigent bachelors and widowers of whatever religious denomination or belief they may be who have shown practical sympathy either as amateurs or professionals in the pursuits of science in any of its branches, whose lives have been characterized by sobriety, morality and industry, and who are not less than fifty-five years of age, or of aiding any scheme which now exists or may be instituted by others for that purpose." The next of kin contended that the bequest was void for uncertainty:—

Held (affirming the decision of the Second Division of the Court of Session), that the bequest was not void for uncertainty, for the trustees, or failing them the Court, would find no difficulty in giving effect to it.

APPEAL from a decision of the Second Division of the Court of Session, Scotland. (1)

The appellants Weir and others were the sole next of kin of the testator John Murdock, and the respondents were the testator's trustees.

(1) (1907) S. C. 185.

John Murdock died in Mid Lothian, Scotland, on December 8, 1901, leaving a trust disposition and settlement dated July 17, 1897, by which he bequeathed his whole means and estate to and in favour of P. G. Tait, then professor of natural philosophy in the University of Edinburgh (since deceased); Alexander Crum-Brown, professor of chemistry, James Geikie, professor of geology, (both in the said university); and T. Hector Smith, manager of the National Bank of Scotland in Edinburgh. The fourth purpose of the testator's settlement was (inter alia) in the following terms: "I direct my trustees to employ the whole residue of my said estate, means, and effects in instituting and carrying on a scheme for the relief of indigent bachelors and widowers of whatever religious denomination or belief they may be, who have shown practical sympathy either as amateurs or professionals in the pursuits of science in any of its branches whose lives have been characterized by sobriety, morality and industry and who are not less than fifty-five years of age, or of aiding any scheme which now exists or may be instituted by others for that purpose; and I confer on my trustees the fullest and most ample powers both in regard to the selection of the persons who are to receive the benefit of the proposed scheme and the mode in which the scheme itself is to be carried out, and without in any way detracting from the powers hereby conferred on my trustees, I suggest that they should, if they deem it expedient, purchase land situated within ten miles of Edinburgh of suitable extent, and erect thereon, furnish and maintain an institution to be known by the name of 'Murdock's Rest' where such persons as are before mentioned might end their days in comfort: at the same time I am well satisfied that when such persons have kind and suitable friends willing to receive them, they are better with them than gathered together in numbers; but in the event of my trustees deciding to adopt my suggestion as to an institution, I would recommend that the building to be so erected should be constructed after the cottage system and of a substantial but not expensive character, and I would further recommend that my trustees should provide and pay for the board of each of the inmates in the before mentioned institution at a cost of, if possible not exceeding, thirty-six pounds fifteen shillings per annum: and with reference to the selection

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of the persons who should benefit under the said scheme in whatever way it may be carried out by my trustees, I would suggest that the first three persons should be either natives of or resident in the county of Edinburgh, and thereafter one person whether a native or resident should be chosen from each county in Scotland in alphabetical order until such requisite number, as my trustees may decide, shall be reached, and on the death or removal from the benefit of the scheme of any person so chosen that a person should be selected in his place from the county next in alphabetical order to that from which the last selection was made, and in the event of no eligible application being received by or on behalf of any person in a county in its order, that a person should be chosen from the county next in order, but that, on the occurrence of the next vacancy, a person should be chosen from such county from which no eligible application was received, and I would also recommend that my trustees should, in making selections to the benefit of the said scheme consider with care and sympathy any application which may be recommended by the provost and magistrates of any Scottish burgh, and I declare that, notwithstanding any of the suggestions or recommendations herein contained, my trustees shall have the sole power of selecting a site for the before-mentioned institution should they deem its erection advisable, and of determining its style and extent and of selecting all applicants, and removing at their discretion those admitted to the benefit of the said scheme."

A question having arisen as to whether the above purpose was void from uncertainty, an action of multiplepoinding, in which the fund in medio was the residue of the estate, was raised by the trustees, the respondents, in which claims were lodged by them and by the testator's next of kin, the appellants. The trustees claimed the whole fund, and contended that the directions for disposal of the residue (about 60,000*l.*) contained in the fourth purpose of the testator's settlement were valid and effectual. The next of kin claimed, (1.) as the sole next of kin of the testator, to be ranked and preferred in equal shares to the whole residue. (2.) Alternatively they claimed to be ranked and preferred in equal shares to the surplus revenue on the said residue. They based their claim to the whole fund on the

ground that the directions as to the application of the residue contained in the fourth purpose were vague and uncertain, and therefore that the said residue fell into intestacy.

On February 2, 1906, the Lord Ordinary (Lord Johnston) found that the bequest of the residue in the fourth purpose was void and uncertain; but on December 7, 1907, the Second Division of the Court of Session reversed that decision, holding that the bequest was not uncertain.

1908. Jan. 16. *Upjohn, K.C.*, and *C. D. Murray* (the latter of the Scottish Bar), for the appellants. There must be a precise description in the will to give a rule to the trustees sufficiently definite to carry out the object of the trust. Here the testator has given no sufficiently precise description of the particular class of objects of the trust. What destroys the precision of the description are the words "practical sympathy"; a person who merely relieves the distress of a scientific friend is entitled to say that he has shewn practical sympathy with science. Is he to receive a benefit under the trust? What is intended in the terms "science," "pursuit of science," "practical sympathy in the pursuits of science," is a matter of individual opinion, in regard to which there may be the widest difference of view. In fact the testator has really delegated to the trustees the power to designate the class that is to take, and such a delegation, according to the law, renders the gift too vague to be carried into execution. It is a condition precedent of a valid charitable bequest that there should be a sufficiently precise direction to enable it to be carried into effect. This bequest fails because no intelligent conclusion can be arrived at as to the particular class of persons intended to be benefited, and the decision of the Second Division was wrong.

J. A. Clyde, K.C., W. J. Cullen, K.C. (with them *Stair A. Gillon*, all of the Scottish Bar), for the respondents. This bequest is for the relief of indigence. This qualification has always been regarded, both in Scottish and English law, as a test of what constitutes a charitable bequest; and both laws are more favourable to charitable than to other bequests. In this trust deed the most ample powers are given to the trustees. If there

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are two meanings applicable to a word in a charitable trust, one defeating the trust and the other enabling it to be carried out, effect will be given by the Court to that meaning which will set up the trust: *Magistrates of Dundee* v. *Morris* (1), where Lord Cranworth said : "There has always been a latitude allowed to charitable bequests, so that when the general intention is indicated the Court will find the means of carrying the details into operation": see also *Whicker* v. *Hume* (2); *Milne's Executors* v. *Aberdeen University Court.* (3) In the latter case a bequest to help in the education of "poor and struggling youths of merit" (an indefinite class of persons) was declared to be valid: *Russell* v. *Kellett* (4) ; and in *Nash* v. *Morley* (5) the words "poor pious persons" were much more difficult to construe, yet it was held a good charitable bequest: see also *Baldwin* v. *Baldwin* (6) ; *Thompson* v. *Thompson* (7) (gift to "literary" annuitant) ; *Loscombe* v. *Wintringham.* (8) It follows from these cases that where there is a general charitable bequest the Court will find means to carry it into effect, and here it will be easy to frame a scheme.

C. D. Murray in reply.

The House took time for consideration.

LORD LOREBURN L.C. My Lords, the question in this case is whether a charitable bequest is to be treated as void for uncertainty. The bequest was of an unusual kind. Its object, according to the will, was to benefit persons who had shewn practical sympathy in the pursuits of science. A number of conditions were prescribed. The recipients of this bounty were, among other things, to be widowers or bachelors of fifty-five years of age or upwards, whose lives had been characterized by sobriety and other specified virtues. They were to be indigent, a provision which stamps the bequest as charitable. These conditions were not really canvassed in argument and need not be further considered, for no one of them is such as to impart to the bequest an uncertainty which will vitiate it in law.

(1) (1858) 3 Macq. 134, 166.
(2) (1858) 7 H. L. C. 124.
(3) (1905) 7 F. 642.
(4) (1855) 3 Sm. & G. 264.
(5) (1842) 5 Beav. 177.
(6) (1856) 22 Beav. 413.
(7) (1844) 1 Coll. 395.
(8) (1850) 13 Beav. 87.

The only point seriously made against this clause in the will is that the recipients of this charity were to be persons who had "shown practical sympathy in the pursuits of science." These words have been subjected to a rigorous criticism. What is science, it was asked, and how are we to know its bounds? What is sympathy in the pursuits of science, and when and how does it become practical? What are pursuits of science in the plural as distinguished from pursuit in the singular? The thought underlying this current of observation seems to be that, if a bequest is to a class of persons, the class must be capable of being defined, and be defined so precisely that there can rarely be a doubt who does or who does not fall within it.

Now there is no better rule than that a benignant construction will be placed upon charitable bequests. It is difficult to imagine a construction less benignant than that suggested by criticisms such as those to which I have alluded. Few indeed are the charitable bequests that could survive such an ordeal. The fact is that whenever any one wishes to describe a class of people otherwise than by referring to their age, sex, birthplace, or similar facts capable of precise ascertainment, the language used must of necessity be general, and there must always be numerous cases on the border line. Deserving literary men who have not been successful, poor members of a particular trade, reduced gentlewomen, are examples of classes of persons who may certainly be benefited; but in each case exactly the same reasoning might be used as was used in the present case to destroy the validity of the will. There is no law requiring that kind and degree of certainty. All that can be required is that the description of the class to be benefited shall be sufficiently certain to enable men of common sense to carry out the expressed wishes of the testator. I have no doubt that this can be done here. Persons who have shewn practical sympathy in an object obviously are persons who have given time or money or made some sort of sacrifice to further it. I am satisfied that the trustees or, failing them, the Court would find no difficulty in giving effect to the bequest. Accordingly I think that this appeal ought to be dismissed. The parties have agreed that the appellants are to have their judicial expenses of appeal out

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of the trust funds, the expenses as awarded in the Court of Session to remain unaltered. I think your Lordships may properly act upon this agreement.

LORD MACNAGHTEN. My Lords, to my mind the difficulty in this appeal—and it is, I think, a real difficulty—is to discover any substance in the appellants' case.

The gift is a gift in perpetuity, to be administered by trustees, for the benefit of bachelors and widowers, poor and aged, whose lives have been characterized by sobriety, morality and industry, "and who have shown practical sympathy in the pursuits of science in any of its branches." This gift, it is said, is void for uncertainty. Why? The relief of those who suffer from the ills of poverty and the weight of advancing years is, by common consent, the peculiar province of charity in its popular as well as in its legal sense. Unhappily it is only too easy to recognize the aged and the poor who are always with us. Then, I suppose, it has happened to most men to have formed an opinion satisfactory at least to themselves as to the moral and the general character of some applicant for some employment or other. Notwithstanding the ingenious argument of the learned counsel who spoke second, I cannot think that the task is really beyond the capacity of any ordinary individual.

There remains one other qualification to be considered. What is science? and what is "practical sympathy in the pursuits of science"?

Science, it was said, is so vague and comprehensive a term as to be unmeaning. In the view of the Lord Ordinary, "'Science' is a term of no definite or 'particular' meaning." That is certainly not the view of the Legislature. There are, for instance, many enactments in favour of institutions formed for the advancement of "science." The generality of the word has never prevented the Court from applying to the particular case before it the provisions of the Act under its consideration. But what is "practical sympathy"? "An altogether nebulous phrase," says the Lord Ordinary. It is not, perhaps, a happy expression. But if you follow the directions of the testator with a willing mind it is, I think, perfectly intelligible. The wish of

the testator was to help those who are in need of help and who may have done something, much or little, in the way of promoting some branch of science. Within the realms of science the field of choice is wide. But the testator has taken pains to provide competent judges. It is for the trustees to consider and determine the value of the service on which a candidate may rest his claim to participate in the testator's bounty.

I think that the case is much too clear for argument, and that the appeal must be dismissed.

LORD ROBERTSON. My Lords, I must own that I think this a perfectly clear case. If it is said of any one that he has shewn practical sympathy in the pursuits of science, this is merely a roundabout way of saying that he has helped the pursuits of science; just as to shew practical sympathy in A. B. means to help A. B. Again, the word "science" embraces a wide but perfectly ascertainable range of subjects. Accordingly I consider the meaning of this testator to be plain and intelligible.

LORD ATKINSON. My Lords, I concur.

Ordered that the appeal be dismissed, and that the appellants have their judicial expenses of appeal out of the trust funds, the expenses as awarded in the Court of Session to remain unaltered.

Lords' Journals, February 6, 1908.

Agents for appellants: *Collyer-Bristow & Co., for Murray, Lawson & Darling, S.S.C., Edinburgh.*

Agent for respondents: *John Kennedy, W.S., for J. & J. Turnbull, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1908 *Feb.* 21.

MONTGOMERIE & CO., LIMITED . . . . APPELLANTS;

AND

THE PROVOST, MAGISTRATES AND COUNCILLORS OF THE ROYAL BURGH OF HADDINGTON . . . . . RESPONDENTS.

Local Government—Burgh Sewers—Notice in Writing to Persons interested—Public Health (Scotland) Act, 1897 (60 & 61 *Vict. c.* 38), *s.* 103—*Burgh Police (Scotland) Act*, 1892 (55 & 56 *Vict. c.* 55), *s.* 217—*Burgh Sewerage, Drainage and Water Supply (Scotland) Act*, 1901 (1 *Edw.* 7, *c.* 24), *s.* 5.

By the Burgh Sewerage, Drainage and Water Supply (Scotland) Act, 1901, s. 5, "The powers and duties of the town council of any burgh, as the authority under the principal Act" (the Burgh Police Act of 1892), "with reference to sewerage and drainage and water supply shall extend to the whole area of the burgh as existing for the purposes of the Public Health (Scotland) Act, 1897, and the town council of any burgh as the authority under the principal Act, in addition to the powers conferred upon them by the principal Act or any other Act, shall with reference to sewerage and drainage or water supply within such area have the same rights, powers and privileges as are conferred by the Public Health (Scotland) Act, 1897, upon local authorities under that Act in districts other than burghs . . . . and in so far as necessary for giving effect to this enactment the last-mentioned Act and the Acts and parts of Acts incorporated therewith are subject to the necessary modifications incorporated with the principal Act." By s. 217 of the Burgh Police (Scotland) Act, 1892, nothing in the Act "shall be construed to authorise the commissioners contrary to any private right to use, injure, or interfere with any sewers . . . . or interfere with any water course . . . . in which the owner or occupier of any lands, mills . . . . shall have right or interest, without the consent in writing of the person legally entitled to grant the same." By s. 103 of the Public Health (Scotland) Act, 1897, "The local authority shall have power to construct . . . . such sewers as they may think necessary . . . . and may carry such sewers . . . . after reasonable notice in writing (if upon the report of a surveyor it should appear to be necessary) into, through, or under any lands whatsoever."

A local authority having laid sewer pipes upon the surface of the bed of a stream, certain proprietors entitled to notice, who considered that they were prejudiced by the pipes being on the surface instead of under the surface, raised an action in which they demanded the removal of the pipes, on the ground (inter alia) that the notice required by s. 217 of the Act of 1892 had not been given:—

Held (affirming the decision of the Court of Session) that, under the Act

of 1901, a burgh, in the construction of sewers, can proceed either under the Act of 1892 or the Act of 1897, and that, the local authority having decided to proceed under the Act of 1897, they were not bound to obtain the consent of the proprietors as required by the Act of 1892.

APPEAL from an interlocutor of the Second Division of the Court of Session, Scotland. (1)

The Public Health (Scotland) Act, 1897 (60 & 61 Vict. c. 38), s. 103, enacts: "The local authority shall have power to construct within their district and also when necessary for the purpose of outfall or distribution or disposal or treatment of sewage without their district such sewers as they may think necessary for keeping their district properly cleansed and drained and may carry such sewers through, across or under any public or other road . . . . and after reasonable notice in writing (if upon the report of a surveyor it should appear to be necessary) into, through or under any lands whatsoever and from time to time to enlarge lessen alter arch over or otherwise improve or to close up or destroy all sewers vested in them."

The Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), enacts, s. 217: "Nothing in this Act shall be construed to authorise the commissioners contrary to any private right to use, injure or interfere with any sewers or other works already made . . . . or interfere with any water course, stream, river . . . . in which the owner or occupier of any lands, mills, ... shall have right and interest without the consent in writing of the person legally entitled to grant the same."

The Burgh Sewerage, Drainage and Water Supply (Scotland) Act, 1901, enacts, s. 5: "The powers and duties of the town council of any burgh as the authority under the principal Act" (by section 1 the Burgh Police Act, 1892) "with reference to sewerage and drainage or water supply shall extend to the whole area of the burgh as existing for the purposes of the Public Health (Scotland) Act, 1897, and the town council of any burgh as the authority under the principal Act in addition to the powers conferred upon them by the principal Act or any other Act, shall, with reference to sewerage and drainage or water supply within such area have the same rights, powers, and privileges as are conferred by the Public

(1) (1908) S. C. 127.

H. L. (Sc.) 1908

MONTGOMERIE & CO., LIMITED v. PROVOST AND MAGISTRATES OF HADDINGTON.

Health (Scotland) Act 1897 upon local authorities under that Act in districts other than burghs, with the exception of the rights, powers and privileges conferred by sections 122 and 131 of the last mentioned Act to which sections the present section shall not apply, and in so far as necessary for giving effect to this enactment the last mentioned Act and the Acts and parts of Acts incorporated therewith are subject to the necessary modifications incorporated with the principal Act."

In 1905 the respondents, the provost and magistrates of the royal burgh of Haddington, resolved upon carrying out a drainage scheme, whereby they uplifted a twelve-inch sewerage pipe which for a number of years had lain below the surface of the bed of the river Tyne, and laid it upon the alveus, which belonged in part to the appellants, Messrs. Montgomerie & Co. The latter owned considerable areas of ground in Haddington, upon which were built the Bermaline mills and maltings, on the east bank of the river Tyne. The appellants claim at least a right to one-half of the alveus of the stream. In addition to raising the twelve-inch pipe the respondents placed alongside it, also on the surface, another drainage pipe eighteen inches in diameter, and they covered over these two pipes with concrete, forming, the appellants alleged, an obstruction two feet high jutting into the river, and running for a considerable distance parallel to the river bank belonging to the appellants. It was further alleged that the result of these operations was to constrict the river channel and create serious risk of damage to the appellants' property by flooding. Accordingly the appellants raised this action to have it declared that the respondents were not entitled to carry out the operations complained of, and for interdict and removal of the works which have been done on the river channel.

The respondents alleged that they proceeded under powers granted to them under s. 103 of the Public Health (Scotland) Act, 1897, in terms of which they contended that the consent of the appellants to their operations was not required; and that they had an option to proceed either under the Act of 1892 or the Public Health Act of 1897. The appellants, on the other hand, contended that in carrying out these sewerage operations the respondents could proceed only in terms of the Burgh Police

(Scotland) Act, 1892, and that under the provisions of that Act they were entitled to lay the pipe on the river bed only if they first obtained the consent of the appellants in writing; and that the Public Health Act, 1897, was not applicable at all.

The Lord Ordinary (Lord Dundas) and the Second Division of the Court of Session sustained the respondents' defences. (1)

Feb. 21. *James Avon Clyde, K.C.*, and *R. S. Horne* (both of the Scottish Bar), for the appellants. The decision of the Courts below was erroneous. The respondents, in carrying out the scheme, were bound to proceed under the provisions of the Burgh Police Act, 1892, and obtain the appellants' consent in writing; this they have not done. The option to proceed under either Act was taken from the respondents by the Act of 1901. Whatever might have been the Code in 1892, after 1897 the existence of two Codes under each Act caused confusion, and the Act of 1901 was intended to remedy doubts as to the proper mode of procedure in various matters. One of its purposes was that all sewerage or water works within a burgh should be executed by the town council, not as the local authority under the Public Health Act, but as the authority under the Burgh Police Act of 1892; and, further, the Act of 1901 having repealed certain provisions of the Public Health Act of 1897, it expressly described the Burgh Police Act of 1892 as the principal Act for all purposes of sewerage, drainage, and water supply. The effect of incorporating the Public Health Act with the Act of 1892 was to make the subsidiary Act, the Act of 1897, conform to the principal Act, the Act of 1892; and inasmuch as consent was required by the Act of 1892, so it is now required by the conjoined Acts. If this view is correct, then the whole of the inconsistencies are cleared away. If the respondents are right the position is worse than ever, for the sewerage authorities need not give any notice when interfering with property, but need only assert that they are acting under the Act of 1897.

[They commented on *Edmonstone* v. *Kilsyth Police Commissioners* (2); *Police Commissioners of Kirkintilloch* v. *M'Donald* (3); *Brown* v. *Magistrates of Kirkcudbright.* (4)]

(1) (1908) S. C. 127.
(2) (1882) 9 R. 917.
(3) (1890) 18 R. 67.
(4) (1905) 8 F. 77.

H. L. (Sc.) 1908

MONTGOMERIE & CO., LIMITED v. PROVOST AND MAGISTRATES OF HADDINGTON.

W. Campbell, D.F., and *R. C. Malcolm* (both of the Scottish Bar) appeared for the respondents, but were not called upon.

LORD LOREBURN L.C. My Lords, I agree with the conclusion of the Second Division for one short reason. The pursuers' contention is that the works executed by the defenders could not lawfully be executed without their consent as required by s. 217 of the Burgh Police (Scotland) Act, 1892. Now in my opinion that section does not touch this case at all. The Act of 1892 furnished burghs with one method of carrying out sewerage works. Another Act, the Public Health (Scotland) Act, 1897, furnished burghs with another method of carrying out sewerage works; and each of those methods was complete in itself. In 1901 an Act was passed which put an end to some of the differences between those two methods, and also contained section 5, which to my mind is the only section of that Act which really concerns us to-day. By that section a burgh obtained or retained all the powers created by the Acts of 1892 and 1897, save as altered by the Act of 1901; and the Act of 1897 was incorporated with the Act of 1892 so far as was necessary to give effect to that enactment.

In my opinion the defenders, as the result, possess the right either to proceed under the Act of 1892—in which case the pursuers' consent was, I assume, needed—or to proceed under the Act of 1897, in which case the consent was not needed. They elected to take the latter course. The appellants cannot dispute that if consent was not needed their appeal must fail. But they say that the effect of incorporating the latter with the earlier Act was to qualify the powers of the latter Act by the restrictions contained in the former, and that as consent is required by the Act of 1892 so it is now required, when the powers of the Act of 1897 are exercised, because of the incorporation.

I can see no foundation for this view. Sect. 217 of the Act of 1892, which requires the consent, is expressed to be a restriction only as to what is contained in that Act. If the appellants' contention prevails, the mere incorporation of a later Act would make it a restriction as to what is not so contained.

I think that this is really a plain case, and that the appeal ought to be dismissed.

Lord Robertson. My Lords, I concur, and for the reasons which have been given by my noble and learned friend on the woolsack. In reaching this conclusion I do not suppose that your Lordships applaud the legislation as it stands, and it is doubtful whether it is either symmetrical or even entirely coherent; but I am afraid as regards some modern legislation the maxim applies, which primarily relates to an earlier system: "Non omnium quæ a majoribus nostris constituta sunt ratio reddi potest."

Lord Collins. My Lords, I am of the same opinion.

W. Campbell, D. F., asked for costs as between agent and client under the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61). There was no doubt the Second Division held that the statute did not apply.

James Avon Clyde, K.C. And you have not appealed against that decision; besides, the Public Authorities Protection Act does not apply to costs in this House: *Fielden* v. *Morley Corporation* (1); *Jeremiah Ambler & Sons* v. *Bradford Corporation.* (2)

Lord Loreburn L.C. If we are to discuss the question of costs, we must put it off till another day.

W. Campbell, D.F. I beg to withdraw my motion.

Ordered, that the appeal be dismissed with costs.

Lords' Journals, February 21, 1908.

Agent for appellants: *John Kennedy, W.S., for T. S. Paterson, W.S., Edinburgh.*

Agents for respondents: *Grahames, Currey & Spens, for John C. Brodie & Sons, W.S., Edinburgh.*

(1) [1899] 1 Ch. 1; [1900] A. C. 133. (2) [1902] 2 Ch. 585.

[HOUSE OF LORDS.]

H. L. (Sc.) 1908 Feb. 27.

CAMERON AND OTHERS (PAUPERS) . . . . . APPELLANTS;

AND

YOUNG AND ANOTHER . . . . . RESPONDENTS.

Landlord and Tenant—Insanitary House—Negligence of Landlord—Right of Wife and Children of Tenant to claim Damages for Illness.

In Scotland, as well as in England, the wife and children of the tenant of a dwelling-house are not entitled to recover damages from the landlord for loss and injury through illness caused by the insanitary state of the premises, inasmuch as they were not parties to the contract of tenancy.

Cavalier v. *Pope*, [1906] A. C. 428, followed; *Hall* v. *Hubner*, (1897) 24 R. 875, dissented from.

APPEAL from a decision of the First Division of the Court of Session, Scotland. (1)

The respondents, James Young and Alexander Young, were proprietors of a dwelling-house in Crieff, Perthshire, which was leased by them to one Robert Cameron. The appellants were Robert Cameron's wife and family, who resided with him in the said house, and they sued the respondents for damages in respect that owing to the insanitary condition of the respondents' premises they all contracted typhoid fever. In May, 1903, Robert Cameron (whose claim against the respondents was settled) took the house in question on lease, and continued to reside there with his wife and family until November, 1905. In July, 1905, the family complained to the landlord's factor of disagreeable smells. In August and September these complaints were renewed and a promise given by the factor to have the drainage inspected. The appellants allege that the factor neglected to remedy the defects, with the result that Robert Cameron and his family contracted typhoid fever in November, 1905, and, as a subsequent examination proved, the illness was caused by the condition of the drainage. At the latter end of 1905 the father was removed to Perth infirmary, and the mother and

(1) (1907) S. C. 475.

children were removed from the house a few days later. The father and the appellants on recovering sued the respondents for damages. The sheriff substitute repelled the respondents' plea of no title to sue, but sustained their plea of relevancy. On appeal to the sheriff, he sustained the plea of no title to sue in so far as regards the pursuers other than Robert Cameron, and quoad ultra allowed him a proof. The pursuer Robert Cameron appealed to the Court of Session for a jury trial; the other pursuers (the appellants) appealed against the sheriff's interlocutor. The First Division sustained the plea of no title to sue as regards the appellants, repelled the respondents' plea to relevancy as far as Robert Cameron was concerned, and appointed issues for the trial at his instance. Subsequently the respondents compromised Robert Cameron's claim by a pecuniary payment. This appeal was then brought against the interlocutor in so far as it found the appellants had no title to sue; and the Appeal Committee allowed the appeal to be prosecuted in forma pauperis on the ground that it could not be said that the appellants had no prima facie case. The action was founded upon breach of contract, and also upon tort, but the argument on the appeal related only to the second cause of action.

Jan. 20. *Charles D. Murray* (of the Scottish Bar), for the appellants. According to Scottish law a wife is entitled in her own right to sue a landlord for damages for injury arising from the insanitary state of the premises.

The First Division, following *Cavalier* v. *Pope* (1), held that the wife and children had no title to sue. But by Scottish law the landlord is under the duty to take care that the premises are in a safe and sanitary condition, and that duty extends to all persons having lawful occasion to be on or about the premises. If any such person sustains injury in consequence of the premises having been negligently allowed to remain in a dangerous state, he is entitled to sue the landlord: see *Cleghorn* v. *Taylor* (2); *Campbell* v. *Kennedy* (3); *M'Martin* v. *Hannay* (4); *Shields* v. *Dalziel* (5); *Hall* v. *Hubner*. (6)

(1) [1906] A. C. 428.
(2) (1856) 18 D. 664.
(3) (1864) 3 M. 121.
(4) (1872) 10 M. 411.
(5) (1897) 24 R. 849.
(6) 24 R. 875.

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The two latter cases are strong authorities in the law of Scotland that the wife of the tenant has an independent right of action in respect of personal injuries sustained by her: see also *M'Kinlay* v. *M'Clymont* (1); *Kennedy* v. *Bruce* (2); *Hamilton* v. *Nimmo*. (3) The case of *Cavalier* v. *Pope* (4) does not govern this appeal in respect that by the common law of England, differing from the common law of Scotland, it is on the occupier that the obligation to keep the premises in a proper state of repair is laid; whereas in Scotland the landlord is bound to maintain in a sanitary condition all urban houses. The wife and child have a claim ex delicto for injury, for they were invited by the husband to occupy the house, and the landlord must be held to have known that the house would be occupied by them.

H. P. Macmillan (of the Scottish Bar) (with him *H. W. Beveridge*), for the respondents. The First Division were right in sustaining the plea of no title to sue quoad the appellants; the only person who had a contract with the respondents was Robert Cameron, the father, whose claim has been settled. Prior to *Cavalier* v. *Pope* (4) the question of title to sue had never come up expressly for decision; and the facts in that case were similar to those here. The decision was decided on no principle of law peculiar to the law of England, and is therefore binding on the Scottish Courts. There was no doubt the Second Division allowed the pursuer a proof of her averments in *Kennedy* v. *Bruce* (2), but that decision was wrong. The only parties who can sue for the defective condition of a house are the contracting parties; for the licence for the parties to be on the premises flows from the contract between the tenant and the landlord, and such contract gives no right to third parties. The case of *Cleghorn* v. *Taylor* (5) and similar cases quoted by the appellants raised quite a different question—whether owners of premises have a duty to prevent injury to neighbours; but once one gets inside the premises at the invitation of the tenant the position is entirely altered. In *Shields* v. *Dalziel* (6) no

(1) (1905) 43 S. L. R. 9.
(2) (1907) S. C. 845.
(3) (1902) 10 Sco. L. Times 394.
(4) [1906] A. C. 428.
(5) 18 D. 664.
(6) 24 R. 849.

plea as to title to sue was taken by the defender. The result is that the appellants are unable to cite any case where the plea of no title to sue was taken except in *Hamilton's case*. (1) In the absence of any contract to the contrary the only obligation undertaken by the landlord is with the tenant; and therefore neither on contract nor ex delicto can the appellants succeed.

The House took time for consideration.

Feb. 27. LORD LOREBURN L.C. My Lords, I have had the advantage of reading the opinion about to be delivered by my noble and learned friend Lord Robertson. I agree with it and have nothing to add.

LORD MACNAGHTEN. My Lords, I have had the same advantage, and I also concur, and have nothing to add.

LORD ROBERTSON. My Lords, the facts giving rise to the important question now before the House are of the simplest. The respondents let to one Robert Cameron, the husband and father of the appellants, a dwelling-house at Crieff. The house was allowed to get out of repair in the matter of drains; disease was generated owing to this neglect, and Cameron and his family, the appellants, suffered accordingly. Cameron's own claim for damages was sued by him in this action; but he has been settled with, and is out of the case. The question is whether the appellants, who are not parties to the contract of lease, have a good ground of action against the landlord.

It seems to me perfectly clear that they have not; and I rest my opinion, not alone on the authority of *Cavalier* v. *Pope* (2), but on principle common to the laws of Scotland and of England, which *Cavalier* v. *Pope* (2) applied.

These respondents were perfectly entitled to let this house or not to let it, and in either case they were entitled to allow the house to fall to pieces and the drains with it, so long as they did not injure any neighbour (by which I of course mean any

(1) 10 Sco. L. Times 394. (2) [1906] A. C. 428.

H. L. (Sc.) 1908 CAMERON v. YOUNG. Lord Robertson.

neighbour in vicinage, whether the title of that neighbour was of property or of passage) or violate any existing law of nuisance, the only restraint on their action being obligations of contract with their tenant. Now it happens that in the present instance they were under such obligation to their tenant, by virtue of a condition which the Scottish law implies in leases of urban houses, that the landlord shall not only give the tenant a habitable house, but maintain it in that state. It ought to be, but apparently is not, superfluous to say that if the law implies this condition it is because this is the customary arrangement in Scottish towns, and therefore, when nothing is said to the contrary, parties are taken to have agreed to it. That an obligation to maintain a house habitable is not an essential term or obligation of the tenure of real property in Scotland, but a matter of agreement, is indeed most strikingly proved by the fact that, in the case of farmhouses, the contrary is the presumption of liability; for there it is the tenant, and not the landlord, on whom this duty of maintenance falls. It thus appears that the landlord's liability is conventional and contractual, and not the less so where it is implied by law and not written in the contract.

The argument for the appellants has indeed rested on invoking principles of the law of neighbours which have nothing to do with the rights of inhabitants of the house. Those principles are embodied in a distinct chapter of Scottish law, and are concerned with what may be called the external or foreign relations of the owner of a house. There he is liable, because the maxim "Sic utere tuo ut alienum non lædas" necessarily imposes on the proprietor the duty of exercising that measure of care which will avoid injury accruing to his neighbour from his house. He must not allow his house to get into such disrepair that it falls down on his neighbour's house, or injures the passer-by in the street. In all those cases the person injured and claiming damages stands on his own rights; and his relation to the offending or negligent proprietor is not constituted or measured by any voluntary contract.

These principles have no application at all to persons who are within the house, for they have and can have no right to be

there except by the licence of the owner, given by the owner, on certain terms, to the person with whom he chooses to contract. Nor can it be omitted from notice that if the appellants' contention were sound, the liability of the landlord may be indefinitely increased or diminished according to the domestic or social relations or tastes of the tenant, over which the landlord has no control.

I have examined all the cases prior to *Cavalier* v. *Pope* (1) which were cited at the bar; and with one apparent, but not real, exception, and one real exception, there is none which conflicts with that decision. All fall within the category of external relations which I have discussed.

The apparent exception is the case of *Shields* v. *Dalziel* (2), in the First Division. There it is quite true that the claim which the Court allowed was that of the wife of the tenant, and not of the tenant. I must, however, point out that neither in the written pleadings nor in the oral argument did the landlord question or object to the title or instance of the wife, the defence being rested on totally different grounds. The pleadings were written, and the argument was conducted by very able counsel, and presumably they deliberately abstained from stating this plea. Suffice it to say that the present question was not before the Court, and the decision in *Shields* v. *Dalziel* (2) is not a judgment adverse to the doctrine of *Cavalier* v. *Pope*. (1)

The other case, which I have called an exception, is *Hall* v. *Hubner* (3), decided by the Second Division. There the landlord argued that "the pursuer being the tenant's wife was . . . . a stranger to the landlord, and must seek her remedy not against him but the tenant." The learned judges, in their reported opinions, take no notice of this argument; but their judgment allowing issues to be lodged amounted to its rejection. This decision, I therefore think, cannot be supported; but this is the only and the slender support of the appellants' case to be found in the Scottish cases prior to *Cavalier* v. *Pope*. (1)

I am of opinion that the appeal ought to be dismissed.

(1) [1906] A. C. 428. (2) 24 R. 849.
(3) 24 R. 875.

H. L. (Sc.) 1908 CAMERON v. YOUNG.

LORD ATKINSON. My Lords, I concur.

LORD COLLINS. I concur.

Ordered that the appeal be dismissed.

Lords' Journals, February 27, 1908.

Agent for appellants: *Walter H. Guthrie, for Murray, Lawson & Darling, S.S.C., Edinburgh.*

Agents for respondents: *A. & W. Beveridge, for Mathie, Macluckie & Lupton, Stirling; Morton Smart, Macdonald & Prosser, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1908 *March* 17.

J. C., HIS WIFE AND CHILDREN . . . . APPELLANTS;

AND

SOCIETY OF CONTRIBUTORS TO THE WIDOWS' FUND OF THE FACULTY OF PROCURATORS IN GLASGOW AND OTHERS. } RESPONDENTS.

Insurance—Professional—Widows' Fund limited to Members of a Society—Contributor expelled from Society—Right to remain a Contributor——Glasgow Faculty of Procurators' Widows' Fund Act, 1833 (3 *Will.* 4, *c. lxiv.*)

In 1870 J. C. was entered a member of the Faculty of Procurators in Glasgow, a corporation established in 1796 by Royal Charter. At the same time J. C. became a member of a mutual insurance society styled "The Society of Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow." The Glasgow Faculty of Procurators' Widows' Fund, 1833, which constituted the society on a new basis, provided by s. 16 that no person should be admitted a member of the Faculty of Procurators without first paying entry money to the widows' fund, and that after such payment the person so admitted as a member of the Faculty of Procurators should be "held and deemed a contributor to or member of the fund and entitled to the benefit thereof under the provisions of this Act." Under s. 18 every person who should be admitted a member of the said faculty should be bound to pay the society an annual contribution during his life; and under s. 9

one of the purposes of the fund was to pay pensions "to the widows and children of the members of said faculty who now are or may hereafter become entitled to the benefit of the fund under the provisions of this Act as hereinafter specified. By s. 26 the contributor was liable to forfeiture for non-payment of contributions; by ss. 27 and 28 he was entitled to redeem his contributions or renounce his interest in the society; but no express provision was made in the Act for the cessation of the contributions on the contributor ceasing to be a member of the faculty.

In 1899 J. C. pleaded guilty to a charge of embezzlement, and the Faculty of Procurators in Glasgow expelled him. The trustees of the Society of Contributors to the Widows' Fund of the Faculty of Procurators also removed J. C.'s name from the list of the society and refused to receive his contributions.

In 1904 J. C., his wife and children raised an action for reduction of the minute of the society, whereby it was resolved that J. C. had ceased to be a contributor to the widows' fund:—

Held, reversing the decision of the First Division of the Court of Session (Earl of Halsbury and Lords Robertson and Collins dissenting), that, according to the Act of 1833, when once any member of the Society of Procurators became a contributor to the widows' fund, he was entitled to continue a contributor, and was entitled to the benefits offered in exchange, even though he ceased to be a member of the Faculty of Procurators, the Act making no provision that a contributor must remain a member of the faculty till his death.

APPEAL against a decision of the First Division of the Court of Session, Scotland. (1)

In 1870 J. C., who with his wife and children were the appellants, was entered a member of the Faculty of Procurators in Glasgow, a corporation established in 1796 by Royal Charter. At the same time he became (as he was bound to under the Act of 1833) a contributor to the mutual insurance society called the Society of Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow, who were the respondents. On the same date J. C. duly paid the entry money to the widows' fund, amounting to 65*l.*, and later paid his marriage tax, amounting to 12*l.* 10*s.* He also paid his half-yearly contributions each year from 1870 to 1899. In 1899 J. C. pleaded guilty to a charge of embezzlement, and the Faculty of Procurators on March 2, 1900, acting within their powers under their later charter of August 20, 1897, expelled him and struck his name off the roll of the faculty. The respondents claimed that they also were entitled to expel

(1) (1904) 7 F. 345.

H. L. (Sc.) 1908 J. C. v. Society of Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow.

him and to deprive him of all the benefits derived from his membership of the widows' fund, and they passed the following minute dated February 4, 1901: "It was reported that" J. C. "had been convicted of a crime and sentenced to five years' penal servitude, and his name had been struck off the roll of the faculty on the 2nd day of March, 1900, and from that day he ceased to be a member of the faculty, or to have any interest therein, and that thereafter, upon the petition of the faculty, his name had been struck off the rolls of law agents and notaries public by the Court of Session. The half-yearly subscription to the widows' fund due by" J. C. "upon the 2nd of February, 1901, had not been paid. The treasurer asked for instructions as to how he was to deal with the case in the event of a subscription being tendered in future. The meeting was of opinion that" J. C. "had ceased to be a contributor to the widows' fund or to have any interest therein, and instructed the treasurer to decline to accept payment of any contributions tendered by or on behalf of" J. C. "and to strike his name off the rolls of contributors." In July, 1903, J. C. wrote to the treasurer of the widows' fund asking the amount of the arrears of contributions due, and stating that he was prepared to pay the amount with interest thereon. The society declined to receive payment, claiming that they were entitled to expel him and deprive him of all the benefits derived from his past contributions. Thereupon J. C., his wife and children raised this action against the respondents, concluding—(1.) for reduction of the minute of February 4, 1901; and (2.) for declarator that J. C. was still a contributor to the widows' fund, and that his wife and children, notwithstanding the passing of the minute of February 4, 1901, were still entitled to all the rights, privileges, and benefits of the widow and children of a contributor to the said widows' fund.

The Faculty of Procurators in Glasgow was erected into a corporate and body politic by Royal Charter dated June 6, 1796. By the charter the members of the faculty were granted the exclusive privilege of practising as law agents in the sheriff courts in Glasgow. Before 1833 the faculty, under a scheme which it had established, granted annuities to widows and children of members of the faculty. The majority of the Law Lords held

that the charter of 1796, the regulations in force under it, and the Act of 1875 (38 & 39 Vict. c. vi.)—following the Law Agents Act of 1873 (36 & 37 Vict. c. 63)—for winding up the affairs of the society were irrelevant, and that the question alone to be decided was a question of contract to be found in the Act of 1833. The Act of 1833 was called "The Glasgow Faculty of Procurators Widows' Fund Act" (3 Will. 4, c. lxiv.). It declared "That all and each of the members of the Faculty of Procurators in Glasgow who are members of or contributors to said fund, and all and every other person or persons who should hereafter become members of and contributors to said fund in manner after mentioned, shall be and are hereby declared members of and contributors to the fund established under the provisions of the Act, and shall be called the Society of Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow." Also under the Act only members of the faculty were eligible for admission to the Widows' Fund Society, and all who became members of the faculty up to 1875, and who were under fifty years of age, were required to become members of and contributors to the society.

The material sections of the Act are commented on in the opinions of Lord Loreburn L.C., the Earl of Halsbury, and Lords Macnaghten, James of Hereford, and Atkinson, and it is not considered necessary to give them here at greater length. On June 25, 1904, the Lord Ordinary (Lord Low) dismissed the appellants' action; and on December 22, 1904, the First Division of the Court of Session, composed of the Lord President (Lord Kinross) and Lords Adam and Kinnear (Lord M'Laren dissenting), adhered to the Lord Ordinary's decision. The appeal was twice argued—first, on June 10 and 11, 1907, before Lords Loreburn L.C., James of Hereford, Robertson, and Collins; and, secondly, on February 6, 1908, before a larger House.

H. P. Macmillan and *A. Maitland* (both of the Scottish Bar), for the appellants. The decisions of the Courts below were erroneous. The question turns upon the contract to be implied from the Act of 1833. By that Act a separate corporation was erected, and the respondents are not entitled to refer to anything beyond the Act. The question is, Could the society strike J. C.'s

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name off the list of contributors, as it did in 1901? The Act of 1875 abolished the widows' fund, which only exists for the purposes of liquidation, there being now only some sixty or seventy members. The respondents contend that by the conviction of J. C. he ipso facto ceased to be a member of the faculty, and therefore ceased to be a member of the widows' fund; but this is not so. By s. 12 it was provided that those of the members who had not redeemed their subscriptions were to continue paying them "during the life of the said members respectively," and there was no stipulation that they were to pay only while they were members of the Faculty of Procurators; and ss. 13 and 14 provide that, if contributors cease paying their contributions and their interest is forfeited, they shall "be entitled to have the forfeiture rescinded" on certain payments being made. After restoration to the position of members they are to continue paying during "the period of their natural life." By s. 16, "after payment of the entry money the person so admitted as a member of the said faculty shall be held and deemed a contributor to or member of the fund and entitled to the benefit thereof under the provisions of this Act." Once, therefore, the entry money was paid, the character of a contributor was indelibly attached to the member, and the benefit acquired could not be taken away except by express provision to that effect. But the Act contains no provision whereby a member of the society forfeits his interest therein in consequence of his ceasing for any cause to be a member of the faculty. The statute provides for the forfeiture of the rights and interests of a member in certain cases—for instance, under s. 25, if he should lodge a certificate false as to his wife's age, or if he should die before intimation of his marriage; and by s. 26 there was a forfeiture if he should allow any sum of money payable as marriage tax to remain unpaid for two years, or the contributions to be in arrear for five years. The only other mode of ceasing to be a contributor was by renouncing his interest under s. 28. That J. C. ceased to be a member of the Faculty of Procurators was quite irrelevant to the question; and the power of revocation claimed by the respondents would equally apply to the case of a person who had ceased to be a member of the faculty for some perfectly innocent reason. The respondents

also relied on two lines in ss. 29 and 30, whereby annuities are to be paid out of the funds of the society to "the widows of deceased" members of the said faculty, and it was contended that in no event could J. C. answer to that description. But the law would not readily adopt so harsh a construction in respect of a contingency not specified in the Act.

Sir R. Finlay, K.C., and *W. Hunter, K.C.* (with them the *Hon. William Watson*) (the two latter of the Scottish Bar), for the respondents. It may be admitted that the question is, What was the contract under which J. C. became a contributor to the society? The terms of the Act of 1833 presume in every clause that the person entitled to the benefits of the funds of the society is a member at his death of the Faculty of Procurators. The origin of the fund, as is shewn by the preamble to the Act and also by the old charter, was for the relief of widows and children "of the members of the said faculty." Therefore it was necessary for a contributor to remain a member of the faculty till his death. It cannot be shewn that the fund was for widows of members who had been "at any time" members of the faculty. By s. 9 the uses and purposes of the trust were declared to be for payment to the widows and children "of the members of said faculty." And again by s. 10 arrears of contributions were to be recovered "from the members of the said faculty" who became contributors to the said fund. This and other sections shew that the fund rests on the basis that it is for the benefit of widows and children of members of the Faculty of Procurators who were members up to the time of their death. The decisions of the Courts below were right.

The House took time for consideration.

Lord Loreburn L.C. My Lords, this case has been twice argued.

J. C., the appellant in this appeal, became a member of the Faculty of Procurators of Glasgow in 1870. Under an Act of Parliament then in force he was obliged to join, and did join, the Society of Contributors, which was a mutual insurance society for members of the faculty, regulated by that Act. He paid a

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considerable entrance fee and an annual subscription down to the year 1899. Subsequently he was expelled from the faculty for misconduct, and the society claim that they also were entitled to expel him and to deprive him of all the benefits derived from his membership and past subscriptions. The question for your Lordships is whether this society was so entitled; and that question must be solved by reference to the Act itself, which is 3 Will. 4, c. lxiv.

To begin with, this much is clear, J. C. cannot be deprived of these benefits as a punishment for his misconduct. There is not a word in the Act which upon any construction can authorize the society to deprive on the ground of delinquency where they could not otherwise deprive. If J. C. is to lose the fruit of his insurance it must be on the ground that he is no longer a member of the faculty, a ground which would apply whatsoever may have been the cause of his ceasing to be a member. And so it comes to this: Ought we to construe this Act of Parliament as meaning that whenever a member of the faculty ceases to be a member he must necessarily also cease to be a member of and contributor to the insurance society?

It is a question of contract. What were the terms on which J. C. became a contributor to this society? I think this is to be settled by the Act alone, and that no help can be gained by referring to anything beyond it.

Under the scheme of the Act any procurator who joins the faculty is compelled to join the insurance society also, and thenceforward to subscribe to it as long as he lives, not, be it observed, for so long as he remains a member of the faculty. He is allowed to renounce the benefits in due form, and will thereupon cease to have any interest in the fund. Also he may forfeit them by specified acts or omissions, all of which relate to some default relative to the fund itself. There is no provision that ceasing to be a member of the faculty shall entail consequences so serious, and I cannot see any sufficient reason for implying such a provision.

It would operate very harshly upon those who had compounded for or, to use the language of s. 27, "redeemed" their annual contributions; also upon any member of the faculty who, having

for many years paid to this fund, desired to quit the faculty for another profession.

Between two equally admissible interpretations the more reasonable should be preferred. And if an Act will read equally well whether or not an unexpressed condition be implied, a Court ought surely not to imply a condition that works hardship. In my view this Act set up a statutory contract of insurance. Even if I thought the Act admitted of it, I would not imply a condition most onerous to the assured unless the Act also required it. But in the present case I do not think there is an ambiguity.

I am of opinion that, according to the letter of the Act, any member of the faculty who once becomes a contributor to the fund is entitled to continue a contributor, and is entitled to the benefits offered in exchange even though he ceases to be a member of the faculty.

Under s. 16, on payment of his entry money a member of the faculty becomes a contributor to the fund "and entitled to the benefit thereof, under the provisions of this Act." Under s. 18 such person is bound to pay the society an annual contribution "during his life." And under s. 9 one of the purposes of the fund is "payment to the widows and children of the members of said faculty who now are or may hereafter become entitled to the benefit of the fund under the provisions of this Act, as hereinafter specified." All that is required is that the person entering the society should be a member of the faculty when he enters it. In my opinion the position of any member of the faculty who has paid his entry money is as follows: He may renounce, he may redeem, he may forfeit the benefits for some cause specified in the Act. But if none of these things happen he is required to keep up his annual contributions whether he remains a member of the faculty or not, and is entitled in return to the benefits like any other contributor.

Accordingly, with the utmost respect, I am unable to agree with the judgment of the First Division.

EARL OF HALSBURY. My Lords, I think it is a very relevant consideration that the corporate body we are now dealing with has from its earliest institution been confined to a separate

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professional class, and that from the year 1796 till 1833 and 1875 it has continued to be so confined and to the present day is undoubtedly so confined that no one can demand to be admitted within it unless he is a member of the class in question.

It is not denied that for entry into the corporation and its ancillary charitable provisions a person must be a member of the Faculty of Procurators. If he is, he may take a part in its government and, among other things, has his chance of being entrusted with the management and distribution of its funds.

By s. 2 of the Act of 1833, which is described as an Act for the better establishing and securing a fund for providing annuities to the widows and children of the members of the Faculty of Procurators of Glasgow, a scheme for the election of its officers is enacted which is described to be for the proper administration of the funds of the society and management of the affairs thereof, and it provides that any member of the society may be re-elected, or any other member may be elected also by s. 11; former regulations as to the fund are cancelled by the statute, and it is enacted that in future the fund shall be administered in pursuance of the new enactment.

Up to the passing of the Act a person to be admitted was required to serve a regular apprenticeship for five years with one of the members of the faculty, but by s. 15 of the Act the faculty was authorized to receive and admit any person who should be found duly qualified "in terms of the original charter, and upon such terms as to payments as the said faculty and the said society hereby constituted shall from time to time appoint."

I presume doubt had been raised as to the lawfulness of some of the appropriations of a portion of the funds, since by s. 8 the appropriation of certain portions of "the funds of the said Faculty of Procurators" was declared to be lawful, and by s. 9 the declaration of the object of the trust, after providing for the necessary charges, goes on to declare what is relevant to the present questions before your Lordships for provision and payment of an annuity to the widows severally and children of deceased members of the said faculty.

The concluding words of that section seem to me most important: "And in the last place for provision and payment of an annuity to the widows severally and children of deceased members of the said faculty, contributors to the fund and society hereby established, and for payment to the widows and children of the members of said faculty, who now are or may hereafter become entitled to the benefit of the fund, under the provisions of this Act as hereinafter specified. And it shall not be lawful to apply the said fund to any other use or purpose whatsoever."

Now it will be observed that this is the section which defines the object of the trust and which prohibits any other disposition of its funds. That part of it which is relevant to the discussion defines the object as widows of members of the faculty who were contributors, and must have been both members and contributors —in the latter part of the section it says "members of the said faculty contributors to the fund and society hereby established."

It seems to me impossible to construe the words here used as if it permitted the qualification for an annuity to cover the case of a widow who did not fill the character of a widow who became a widow by the death of her husband while he was a member of the faculty and besides being a member of the faculty had also been a contributor to the fund.

I do not think the question of forfeiture or loss of money comes into the question of construction. It is a question of what this definition of the object of the trust means, and, with all respect for those who think differently, I cannot doubt what the true construction is, much as I respect the views of those who differ. It may, of course, present a case calculated to raise a feeling that some injustice is being done when a man who has paid this contribution for twenty-nine years is refused permission to continue his contributions and thus lose for his wife and children a provision intended for them; but upon the question of construction it is immaterial whether it was twenty-nine years or twenty-nine days. If the contributor died within the first year and was a detected thief the day after his entry the construction must be the same. For my own part, I cannot understand why such a society, which means to confine those who enter it to those possessing a particular professional qualification, is not

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supposed to possess throughout the qualification without which he could not have entered the society.

Neither am I much impressed by the absence of a distinct provision that such a qualification is taken away by the person being detected as a thief. And, as I understand the argument, it is not now denied that, quite apart from the express power by later legislation, it was quite within the powers of the governing body to deprive the appellant of his character of procurator. Yet because of his having contributed to the society, which is simply ancillary to it, it is argued he is still entitled to become a contributor.

I think that I misunderstood Lord M'Laren's observations (1) as to the power which every corporation possesses both of disfranchisement and amotion for heinous crimes, such as embezzlement undoubtedly is : see Lord Mansfield's judgment in *Rex* v. *Mayor of Liverpool* (2); and though the loss of pecuniary profit may follow as a consequence, it seems to me fallacious to treat as itself a penalty what is the consequence of a loss of qualification, and the whole question seems to me to depend upon whether being a Glasgow procurator is or is not a qualification for joining in the society for providing funds for the widows and children of Glasgow procurators.

I have hitherto referred to the section which declares the object of the trust, but there is nothing in the rest of the Act which seems to me to militate against the construction I put upon that section. On the contrary, the title and preamble of the Act of 1833 seem to me to disclose with some distinctness the purpose of the Act, and certainly I should not suppose from the language used it was contemplated to erect two different societies, since the objects sought to be obtained are to be "the objects of *the said* incorporation." The charter granted, and the Act referred to, or said to be the Act, is said to be for the better and more convenient distribution of the funds thereof; still, be it observed, it is assumed to be the same corporation, and the Act is for the better and more convenient distribution of the funds thereof.

The preamble proceeds to recite that the said faculty appropriated certain sums of money from the *said* funds and other

(1) 7 R. at p. 352. (2) (1759) 2 Burr. 723, 731.

contributions from the then present members *and future members of the said* faculty, for establishing a fund or scheme for members and widows and children of the said faculty contributors—observe it is still members who are within this description, but they must also be contributors. It goes on to mention that at a meeting of the members on February 5, 1827, amended regulations were made and approved of by the said faculty at the time.

It then recites several alterations and amendments in the said scheme, that members of the said faculty made certain alterations for the better management and distribution of the said fund. It then recites the great increase of the said fund by the contribution of the members of the said faculty. It declares that it is expedient, without prejudice to what has been done, that the said faculty should be enabled more effectually to manage the said fund and to extend the usefulness thereof by making provision for more ample annuities to the widows and children of the members of the said faculty who may be willing to contribute for that purpose, and to adopt certain regulations for the more sure establishment and better administration of the said fund, and for the continuance of the benefits thereof, but which objects cannot be carried into effect without the authority of Parliament.

It then proceeds to enact that all and each of the members of the Faculty of Procurators in Glasgow and every other person who shall hereafter become members of and contributors to the said fund in manner after mentioned shall be and are hereby declared to be members of and contributors to such fund established under the provisions of this Act, and shall be called the Society of Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow.

It is an old observation that in construing an Act of this character it is not the language of the Legislature itself, but the language which the promoters have used and to which the Legislature has assented.

I say this because the words I have quoted are in some respects slipshod and inaccurate. I do not know, speaking accurately, what is the meaning of the words "members of a fund," but it is impossible not to see what the draftsman

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intended. He has throughout referred to the faculty and its members in respect of the greatly increased contributions by the faculty, the enabling of the said faculty effectively to manage and to extend its usefulness, and for giving more ample annuities to widows and children of "the members of the said faculty who may be willing to contribute for that purpose."

From first to last I can find no trace of any intention to establish a fund independent of and not for the benefit of the profession of the Faculty of Procurators. That some words were necessary when the rule of compulsory contribution was abolished is plain enough, and that they only should be entitled who contributed is one thing, but that people who were not members of the faculty should be entitled to contribute is another and a very different thing.

I do not think it is very relevant to the matter now in hand to consider the cases where by voluntary retirement the contributions should cease; they are provided for.

The very last words of the 1st section quoted by some of your Lordships describes the Widows' Fund of the Faculty of Procurators in Glasgow.

It is in view of the preamble and the enacting part of the 1st section that I think the 29th and 30th sections so important. It does not appear to me that there was ever any intention to alter the constitution of the society, but the abolition of the compulsory contribution rendered appropriate an alteration of the phraseology, which, however, has not throughout been observed with strict accuracy, but the language appears to me to be sufficiently plain that while only the contributing members of the society should receive the benefit it is assumed all through that they must be members of the faculty.

I am afraid I do not follow the argument derived from the statement that the relation between the corporation and its members is that of contract. There is no other contract than that of becoming a member of the corporation, and as such liable to all the incidents which belong to an individual corporator.

Lord Mansfield said the causes of the amotion of a corporator are (1), first, offences against the duties of his office as a corporator;

(1) See *Rex* v. *Mayor of Liverpool*, 2 Burr. p. 733.

secondly, crimes in their own nature heinous and against the offender's general duty as a subject; yet not particularly relating to his corporate office or duty. It can hardly be doubted that the offence of embezzlement comes within Lord Mansfield's second category and requires no express contract that he should be removable for such a cause.

It would be intolerable that because a man was once a corporator the non-criminal corporators should be compelled to associate with and take part in the business of the corporation with a person who had been convicted of theft and suffered the punishment of penal servitude.

It is by the act of the person thus guilty that what is called his loss is incurred, and, indeed, it is not quite accurate to describe it as if his investment was entirely lost. During the twenty-nine years he had the security of his investment for his wife and children; if at any time he had died during the period, and if in the end the pension has been lost, it is because he had committed a crime which involved the loss of his qualification when he was found out.

For these reasons I am of opinion that the judgment below was right and ought to be affirmed.

LORD MACNAGHTEN. My Lords, in 1870 the appellant, J.C., became a member of the Faculty of Procurators in Glasgow, a corporation established in 1796 by Royal Charter. At the same time he became a member of a mutual insurance society styled "The Society of the Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow." This society was constituted by Act of Parliament in 1833. The Act provides in s. 16 that no person shall be admitted a member of the Faculty of Procurators without first paying entry money to the widows' fund, and that after such payment the person admitted as a member of the Faculty of Procurators shall be "held and deemed a contributor to or member of the fund, and entitled to the benefits thereof under the provisions of this Act."

In March, 1900, J. C., having been convicted of embezzlement, was struck off the roll of the faculty. The trustees of the insurance society then removed his name from the list of the

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society. It is not suggested that their action was justified by the crime which J. C. had committed. Misconduct has nothing whatever to do with the position taken up by the respondents. Their attitude apparently would have been just the same if J. C. had left the faculty with an unblemished character and of his own free will. Their contention is that if a person becomes a member of the society, and so by statute entitled to the benefits of its fund, and afterwards, from any cause or for any reason, ceases to be a member of the Faculty of Procurators, his statutory rights as member of the insurance society are at once extinguished and all his contributions confiscated for the benefit of the society. Is that contention sound?

The question, as it seems to me, depends on the meaning and effect of the Act of 1833, and on nothing else. Except so far as may be gathered from the recitals in the Act, the charter of 1796 and the regulations in force under it are, in my opinion, irrelevant. Equally irrelevant, I think, is any reference to a subsequent Act passed in 1875 for winding up the affairs of the society. The question is simply a question of contract, and the contract is to be found within the four corners of the Act of 1833.

The widows' fund had its origin in certain provisions made by the Faculty of Procurators for the benefit of widows and children of members. Before the Act of 1833 everything was in the hands of the faculty. The allocation and distribution of its funds was a matter of domestic arrangement and regulation. By the Act of 1833 the condition of things was altered. The old widows' fund with its existing liabilities was handed over to the insurance society, which was to have no claim on the faculty fund in respect of new members. The society from its inception was a body separate and distinct from the faculty. Even the members were not identical, for no one who became a member of the faculty after reaching a certain age could enter the society, and members of the society might leave that body and still continue members of the faculty. The society had its own treasurer and was under the control of its own officers. It had no disciplinary powers. It had no function but that of an insurance society. It was purely a business association of a common type intended to be conducted on sound actuarial

principles, subject to periodical investigation in accordance with the most approved tables of mortality, "taken in connection," as the Act itself declares, "with . . . . the experience of this and similar schemes." It is quite true that entrance to the society could only be gained through admission to the Faculty of Procurators. Membership of the faculty was the only passport to the society. So far, but no further, the faculty and the society were linked together. When once the entrance gate was passed and a person became "a contributor to the widows' fund and entitled to the benefits thereof" his only statutory obligation to the society besides payment of a marriage tax, if exigible, was to contribute during the whole of his life unless and until he purchased exemption by compounding or by contributing for a period fixed by the Act, or unless and until he renounced in due form for himself and for his widow and children all interest in the society and its funds.

The argument of the respondents, if I understood it aright, was founded partly on the language of the declaration of trust contained in the Act of 1833 and partly on inferences derived from the circumstances and position of the widows' fund before the Act.

The latter branch of the argument, which, at first sight, seems the more formidable, and on which much stress was laid, is, I think, displaced and excluded by the Act itself. In s. 11 it was enacted that the regulations in force before the passing of the Act should be annulled, and that the fund as vested in the officers of the insurance society, with the whole increase thereof, should be administered under the provisions of the Act of 1833.

The declaration of trust on which the respondents rely is to be found in s. 9. That section declares that the uses and purposes of the society and of the funds vested and to become vested in it or in the trustees thereof shall, after satisfying certain prior charges, be "for provision and payment of an annuity to the widows severally and children of deceased members of the faculty contributors to the fund and society hereby established." Then follow these words dealing with present and future contributors—"and for payment to the widows and children of the members of the said faculty who now are or may hereafter become entitled to the benefit of the fund under the provisions of

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this Act as hereinafter specified." What is the meaning of these latter words? In construing them you must, I think, bear in mind two things. In the first place, a person could only enter the society as a member of the faculty. The society was formed for the purpose of insuring members of the faculty and no others. In the next place, a member of the society, in the view of the framers of the Act, became "entitled" to the benefits of the society's fund immediately on his admission. That is plain enough from the language of this section. It is plainer still from the language of s. 16, which has been referred to already. Now, the learned counsel for the respondents in construing the clause under consideration seemed to omit, or leave out of sight, the most important part of it. They read the clause as if the declared purpose of the fund was "for payment to the widows and children of the members of the said faculty" without anything further in the way of defining the class of persons intended to be benefited. I venture to think that is not quite right. If I might paraphrase the sentence I should say the true meaning is "for payment to the widows and children of persons who, being members of the faculty, are, or may hereafter be, admitted to the society, and by virtue of their admission become entitled to the benefit of the fund." This construction is consistent with what is found in subsequent sections, where the phraseology is varied and the persons entitled to the benefits of the fund are described sometimes as "contributors" simply and sometimes as "members of the fund" without any reference to membership of the faculty. What is more important is that it is consistent with the fundamental constitution of the society as declared in s. 1. The constituents of the society besides the then members of the widows' fund are to be "all and every other person or persons who shall hereafter become members of and contributors to said fund in manner after mentioned." The only conditions of membership of the society are entrance in the prescribed manner and contribution, not contribution plus continued membership of the Faculty of Procurators.

The construction for which the respondents contend would certainly lead to strange and harsh results. A person might be a member of the Faculty of Procurators and also a member of

the insurance society; he might have compounded for all future contributions to the widows' fund and thus have purchased for his wife and children the benefit of the annuity by payment in full. Suppose he were then struck off the roll of procurators in order to enable him to join the Bar or some other profession, membership of which might be incompatible with membership of the faculty, it would be a strange thing that he, or rather his wife and children, should lose the benefit of his purchase—it would be a strange thing too, unheard of, I should think, in the practice of insurance societies, that this insurance society without making any refund should appropriate a windfall which the actuarial calculations of an insurance society would not, I suppose, take into account. But, however that may be, I rest my judgment simply and solely on the Act of 1833. It seems to me that when a person is declared by Act of Parliament to have become a member of a statutory body, and to be entitled to the benefit of a certain fund, his status and rights are not to be destroyed or taken away without plain language. An implied power of expulsion seems to me something of a novelty. Forfeitures, as a great judge has said, "are not favoured in the law."

I think the order appealed from ought to be reversed.

LORD JAMES OF HEREFORD. My Lords, the question raised in this case can easily be stated.

The Faculty of Procurators in Glasgow are a corporation existing under a charter. In 1833 an Act of Parliament was passed for the better establishing and securing a fund for providing annuities to the widows and children of the members of the faculty. The general effect of the statute is that persons becoming in the future members of the faculty had to contribute to the widows' fund, and, upon making certain payments, would be entitled to certain benefits. By the concluding words of the 1st section of the Act the position of such contributors is thus defined—"shall be called the Society of Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow."

The pursuer, J. C., being a member of the faculty, became in 1870 a contributor to the widows' fund, making payment by way

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of entrance and subscription amounting to 179*l*. He was always ready and offered to continue to pay the subscriptions due from him.

In 1899 J. C. pleaded guilty to a charge of embezzlement, and the faculty, acting within their powers, expelled him. The question before your Lordships is, What are the effects of that expulsion? Does it carry with it any forfeiture or loss of the benefits under the widows' fund to which J. C. was entitled by virtue of his contributions? I think that it does not.

The argument of the respondents is that inasmuch as no one could become a contributor to the fund unless he were a member of the faculty, in like manner he lost his rights under his contributorship if he ceased to be such member of the faculty.

But such argument cannot be supported by anything expressed in the statute; it is by force of inference only that such contention can prevail.

Where, as in this case, it is sought to effect a loss of moneys paid, surely there ought to be clear and distinct grounds for drawing such inference. I cannot find them. On the contrary, I think the provisions of the statute shew that it was intended to protect the interests of the contributor. He is entitled to renounce or to redeem under ss. 27 and 28, and is liable to forfeiture only for non-payment of contributions under s. 26 of the Act.

It is true that in the first instance a contributor to the fund must be a member of the faculty, but obligations are imposed upon him by the statute to make certain payments not only whilst he is a member of the faculty, "but during the period that each of such contributors respectively shall use and be a member of such society."

Now a member of the faculty may desire to resign such position—as, for instance, if he sought to become a member of the Bar of England or Scotland—and the respondents' argument must go to the extent of saying that in such a case all right to the benefits resulting from the contribution would be lost. No reliance is placed upon the fact that in this case misconduct has occurred. It is the absence of J. C.'s name from the roll that is relied upon. If this were sufficient to cause the forfeiture

the statute may well have said so; but it has not, and in the absence of any express declaration that only members of the faculty can be allowed to remain members of the contribution fund, I come to the conclusion that the appellants' contention is correct and ought to prevail.

LORD ROBERTSON. My Lords, the judgment which I am now about to read was written after the first hearing, and I have nothing to add.

I am of opinion, and as there is a difference of opinion it is right to say clearly of opinion, that the judgment appealed against is right.

The claim of the appellant is that, albeit he is not a member of the Faculty of Procurators, he is entitled to contribute to their widows' fund and to receive the benefits of that institution. It seems to me that from the beginning, and of its essence, this fund has been one purely domestic to the faculty, and that none of the modifications of the institution have impaired this essential characteristic and condition. Nor do I find in the successive charters and statutes anything affording the smallest countenance to the idea that the fact that a man, while a member of the faculty, has been a contributor to the fund gives him any right to contribute to the fund when he has ceased to be a member. The nature of all such insurance exposes it to the risk that the contributions of years may be lost if a man has not the money, or has not the qualification, to contribute in later years. But I hope that I need not remind your Lordships that hardship will not supply a ground of decision which the contract does not supply, and that it would be at least as irrelevant to deplore J. C.'s loss as to reflect on his fraud.

Now I do not intend to rehearse the developments of this fund; for this has been done very adequately. But I take the several stages.

I should have thought it past all doubt that the claim of the appellant would have been impossible if the Act of 1833 had stood alone. The preamble and the enacting section (s. 1), make membership of the faculty the qualification of contributing to the new fund; and, when we come to s. 9, the Act declares the purpose

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of the trust to be the payment of annuities to the widows and children of members of the faculty, "and it shall not be lawful to apply the said fund to any other use or purpose whatever."

Now I turn to the Act of 1875, which, as has been said with substantial accuracy, provides for the winding up of the fund. I must own that, this being so, it would be a singular occasion for increasing the number of contributors by bringing in persons who ex hypothesi were hitherto outsiders, or by abolishing a condition which on the same hypothesis had hitherto attached to existing contributors. In truth, however, the negative words of s. 3 do not contain any such implication.

Lord Robertson.

In what I have said, I assume the right of the faculty to remove from their membership persons disqualified from membership, and such is a person convicted of the crime of embezzlement. I do not suppose that this was a new power conferred by the supplementary charter; but it is there in black and white. The truth is that membership of any such body is precarious to this extent, that it is not the fact of a man having been honest at the time of his admission that will retain his position if in the sequel he is found dishonest. The same kind and degree of precariousness attend the corresponding investment of money by contributing to a professional widows' fund; that and nothing more.

On these grounds, I am for affirming the judgment of the First Division.

Lord Atkinson. My Lords, whatever may have been the true relation between the Faculty of Procurators in Glasgow and the contributors to the widows' fund before 1833, the statute of that year, in my opinion, entirely altered their relative positions, and gave to those contributors a corporate existence, distinct from, and to a certain extent independent of, the older corporation. It was by s. 1 of that Act provided that those persons who were at the passing of the Act members or contributors to the widows' fund, together with all other persons who should thereafter become members or contributors to the fund, "in manner thereafter provided" should form the corporation. From that time forward the new corporation stood to the old very much, I think, in the position of an insurance company. Every member under

fifty years of age admitted to the faculty was bound to become a contributor to this fund, whereby, in consideration of the payment of a lump sum, varying from 25*l.* upwards in an ascending scale according to his age, plus an annual contribution or premium during his life of 3*l.* 10*s.*, or such larger sum as the society should have theretofore fixed, together with interest and penalties as in the statute provided, certain annuities were, after his death, to be paid to his widow or children. Every member of the society could redeem, i.e., compound for, his annual contribution, and thus, if he were so minded, pay a lump sum at once. And none but members of the faculty could become contributors.

It was not disputed, as I understood, that the relation between the contributors and the new corporation became from 1833 a contractual relation. And the point for your Lordships' decision is, in my view, this, whether it is an implied term of this statutory contract—it is certainly not an express one—that the insurer must continue to be a member of the faculty until his death, so that if for any reason he, during his life, should cease to be a member of the faculty, he should ipso facto forfeit everything he had paid and the society be relieved from every obligation to pay anything whatever to his widow or children.

This contingency, as appears from the actuarial tables used, was not taken into account in fixing the amount of the contribution. The latter is uniform, and the lump sum varies with the age of the insurer, and with that alone.

Sect. 13 provides for the restoration of members of the faculty whose interest in the fund shall have been forfeited, and s. 14 enacts that on being restored they shall become members of the society, and each shall pay to the treasurer 1*l.* 10*s.* *during his natural life*. Sect. 21 enacts that the customary payments of 1*l.* in respect of every contributor who was admitted to the benefit of the fund before February 7, 1814, and of 1*l.* 10*s.* in respect of every contributor admitted after that date, shall continue to be paid by the faculty "during the period *that each of the said* contributors respectively shall live and continue to be a member of the society," not, be it observed, continue to be a member of the faculty.

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Sect. 18 provides that every person who should thereafter be admitted to the faculty should be bound to pay to the treasurer of the society for its benefit annually "*during his life*" the sum of 3*l.* 10*s.* or such larger sum as the society shall have theretofore fixed and appointed.

All these sections apparently contemplate that the annual payment should continue to be made *during* the life of the contributor, and that this is their true meaning is, I think, enforced by the fact that special provision is made for the cessation of this payment in three particular instances, and those alone, namely, (1.) where the contributor has paid for forty years (s. 27); (2.) where he has renounced all benefits of the fund (s. 28); and (3.) where his interest in the fund has been forfeited by reason of his having been guilty of one of the several acts or defaults specified in the various sections each of which is in its nature injurious to the interests of the fund. No provision whatever is made for the cessation of the contributions expressly made payable *for life*, on the happening of such a probable event as the contributor's ceasing, for any reason, to be a member of the faculty. Prima facie it must, I think, strike one as strange that such a contingency was not expressly provided for, if it was the intention of the Legislature that forfeiture should follow upon its occurrence. It has been urged on behalf of the respondents that the omission is accounted for by the history of the fund, and by the special wording of several sections of the Act, notably the 9th, 29th, and 30th, which shew that the *widows* or children who are to receive annuities are the widows and children of persons who, at the time of their decease, were members of the faculty, and that anything in the nature of a forfeiture clause, such as is above suggested, is therefore unnecessary.

The past history of the fund cannot, in my opinion, furnish any key to the meaning of the language of a statute which so fundamentally altered the previous position of things as did the Act of 1833, while the words used in the several sections relied upon do not, I think, when examined, lead to the conclusion contended for. The words which occur in s. 9 have been already quoted. Those used in s. 29 are "there shall be paid out of the funds of the said society to each of the widows of the deceased

members of the said faculty whose names are specified in Schedule A"; and those in s. 30 the following: "there shall be paid out of the funds of the said society to the widow of every member of the said faculty who shall have contributed to the said fund." It is to be observed, however, that in both ss. 29 and 30, where the payment of annuities to children is dealt with, the words used are "deceased contributors" and "in case any member of the said society shall die" and "widow of a contributor," while in s. 31 the event, of the proof of which the trustees are empowered to call for evidence, are described as the "death of contributors." Again, in s. 33 the phrase used is "widow of more than one contributor in succession." And in s. 34 the word "contributor" is used throughout the section, the words "member of the faculty" never, while the phrase "widow or children of such contributor" frequently occurs. It is clear, therefore, that under all the sections the essential fact which must be proved in order to entitle a widow, or a child, to an annuity is, that the husband of the widow, or father of the child, must have been a contributor at the date of his death, unless he had already redeemed, or had paid his contribution for forty years. These are the only exceptions. In the face of the clear provisions of ss. 9 and 16, which have already been quoted, I think the words "widows of deceased members of the faculty," or words of the like kind, may, when used in the three sections above mentioned, well be held to mean the widows of men who were members of the faculty, and who consequently became contributors, but subsequently ceased to be members of that faculty yet continued to be contributors; so that one is not constrained to adopt a construction which, at all events in the case of men who have paid their contributions for forty years, or who redeemed them, and thus purchased the benefits provided for their widows and children, if not in the case of others, would work the most gross injustice. Neither will this construction prejudice the interest of the faculty or of the society, while, in my view, it reconciles the several sections of the statute of 1833 with one another and makes them consistent. If it be the correct construction, as it appears to me to be, then I think J. C. has not forfeited his interest in the fund, and the respondents were not justified in the course they took: that decision of the

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First Division was wrong and should be reversed, and this appeal allowed with costs.

Lord Collins. My Lords, at the close of the first hearing I arrived at the conclusion that the decision of the Court below was right. Afterwards I had the opportunity of reading in print the opinion of Lord Robertson. I did not attempt the superfluous task of trying to modify or improve upon that opinion, for I frankly felt I could not. Since then the case has been re-argued, and I am bound to say that the re-argument tended to confirm my original opinion. Since then again that opinion has been reinforced by that of my noble and learned friend Lord Halsbury, with the result that, with all deference to those who hold the opposite view, I am compelled to give my opinion that the judgment of the Court below is right, and that this appeal ought to be dismissed.

Lord Loreburn L.C. My Lords, as the majority of your Lordships are in favour of allowing this appeal, I shall propose the following order: "That the minute or resolution of February 4, 1901, be reduced and that it be found and declared as concluded for." I apprehend if any question arises in the drawing up of this order the parties will settle it themselves. Failing that, it will be possible to submit it for your Lordships' consideration.

Ordered, that the order appealed from be reversed; that the minute or resolution of February 4, 1901, *be reduced and that it be found and declared as concluded for; and that the respondents do pay to the appellants their costs here and below.*

Lords' Journals, March 17, 1908.

Agents for appellants: *A. & W. Beveridge, for J. Gordon Mason, S.S.C., Edinburgh.*

Agents for respondents: *Grahames, Currey & Spens, for Webster, Will & Co., Edinburgh.*

[HOUSE OF LORDS.]

GENERAL ACCIDENT, FIRE, AND LIFE ASSURANCE CORPORATION, LIMITED. APPELLANTS;

AND

McGOWAN . . . . . RESPONDENT.

H. L. (Sc.) 1908 *April* 8.

Inland Revenue — Income Tax — Deductions for unexpired Risks — Fire Insurance Company.

A company carrying on the business of fire, sickness, accident, and guarantee insurance (as distinguished from life insurance) is not entitled, in estimating the balance of its profits chargeable with income tax, to deduct or make any allowance for estimated risks unexpired at the end of the year.

Scottish Union and National Insurance Co. v. *Inland Revenue*, (1889) 16 R. 461, and *Imperial Fire Insurance Co.* v. *Wilson*, (1876) 35 L. T. 271, affirmed.

APPEAL from a decision of the First Division of the Court of Session, Scotland, sitting as a Court of Exchequer. (1)

The appellants were the General Accident Insurance Corporation, Limited, who carried on the business of fire, sickness, accident, and guarantee insurance at Perth and elsewhere in Scotland. The respondent was James McGowan, surveyor of taxes. On December 15, 1905, the appellants appealed against an assessment made for the purposes of the Income Tax Acts. The assessment was for the year ending April 5, 1906, on the sum of 20,950*l.* under Sched. D of the Income Tax Acts. This was arrived at by reference to the appellants' revenue account. The appellants objected to the assessment on the ground that in calculating the assessable profits the surveyor of taxes had allowed no deduction to meet losses on unexpired risks. The appellants contended that they were entitled to deduct from the total premium income of each year, on yearly policies, the estimated or probable losses on risks unexpired at the end of each year, and they calculated that such unexpired risks would be equal to one-third in each year of the total premiums, and accordingly they claimed that, taking their revenue account for

(1) (1907) S. C. 1004.

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the three years previous to December 31, 1904, the amount they were assessable on was 5112*l.* 14*s.* 10*d.* and not 20,950*l.* The Commissioners, following *Scottish Union and National Insurance Co.* v. *Inland Revenue* (1), disallowed the appellants' claim; and the First Division of the Court of Session, following that case and the English case of *Imperial Fire Insurance Co.* v. *Wilson* (2), dismissed the appellants' appeal. (3) Lord M'Laren, who gave the leading opinion of the Court, stated that the point was not new, and that a distinction had long been recognized between the character of the business done by fire insurance offices and the character of the business done by life insurance offices, the one being an annual contract of indemnity, and the other being a prospective contract which may endure for the whole course of the life of the person making the contract, and continued: "Obviously these two classes of insurance business have to be treated on different principles. Now, with regard to fire insurance, their Lordships" (in the above-mentioned Scottish case), "who had the English case before them, were satisfied . . . . that the contract was an annual contract, and that while a complete deduction could not be made in the year in which the premiums were paid, yet what was not made in that year was allowed in the following year, and thus approximate justice was done between the Crown and the subject." His Lordship continued: "Acquiescence for eighteen years in the principle of the above Scottish decision shews that the insurance companies had not felt aggrieved by the rule there laid down."

March 19, 20. *Danckwerts*, *K.C.*, and *A. H. B. Constable* (with them *Gilbert H. Beyfus*) (the second of the Scottish Bar), for the appellants. The Court of Session sustained the finding of the Commissioners on the ground that the point here had been decided by a Court of co-ordinary jurisdiction and that they were in fact bound by that decision. All the fire policies issued by the appellants are issued for one year only; and it is the invariable practice of insurance companies to estimate the unexpired risks at any given date on yearly policies of

(1) 16 R. 461. (2) 35 L. T. 271.
(3) (1907) S. C. 1004.

insurance, whether against fire, sickness or accident, at one-third of the total premium income of the year. In dealing with the profits of the company it must be borne in mind that they are trading profits, to be estimated in the same way that a trader would estimate his profit, and unless the contingent risks are deducted a correct estimate of the income cannot be made. In the case of a company with a stationary premium income the element of unexpired risks may be of no material consequence, but in the case of a company with a progressively increasing income the element of unexpired risks becomes material, for the amount brought forward from the previous year is always exceeded by the amount debited for the year under consideration. The appellants' premiums during the period to which the appeal relates advanced from 232,000 in 1902 to over 262,000 in 1903 and to over 306,000 in 1904. It follows that the apparent profits of the appellants for 1905-6, calculated according to the method adopted by the Court below, were over 15,000*l.* in excess of the amount calculated according to the appellants' method. Unexpired risks have always been allowed in life insurance cases, and these unexpired risks are estimated by actuarial calculation; otherwise a proper income return cannot be made. And there can be no difference in a monthly life insurance. There ought, accordingly, to be no difference in the method of calculating income between a yearly fire or accident policy and a life policy. It is wrong to estimate premiums as profits if unexpired risks are not taken into account, and this principle is recognized in other branches of the law: *In re County Marine Insurance* (*Rance's Case*). (1)

It cannot be said that there are any profits until allowance has been made for the unexpired risks; and this is quite consonant with what was laid down in this House in *Gresham Life Assurance Society* v. *Styles*. (2) In *Imperial Fire Insurance Co.* v. *Wilson* (3) the observations of Huddleston B. are really in the appellants' favour. The question came into view indirectly in *Last* v. *London Assurance Corporation*. (4) With regard to the

(1) (1870) L. R. 6 Ch. 104.
(2) [1892] A. C. 309, 315, 323.
(3) 35 L. T. 271.
(4) (1884) 12 Q. B. D. 389; 14 Q. B. D. 239; (1885) 10 App. Cas. 438.

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decisions—*Scottish Union and National Insurance Co.* v. *Inland Revenue* (1) and *Imperial Fire Insurance Co.* v. *Wilson* (2)—relied on by the Court below, in neither case had there been a material increase in the premium income on yearly policies. The appellants contend that every principle which applies to life assurance applies to fire insurance, and that the decision of the Court below was wrong.

Sir W. S. Robson, *A.-G.*, and *Munro* (of the Scottish Bar) (with them *A. Ure*, *Solicitor-General for Scotland*), for the respondent. The Income Tax Commissioners in estimating the profits of the company have followed the method adopted by the company in ascertaining the dividend payable to the shareholders. They refuse to make any deduction from the profits in respect of unexpired risks, thinking that these risks may be considered as protected by the reserve fund. The proper mode of ascertaining the amount of net profits is to take on one side the receipts and on the other the whole expenditure and disbursements for the given year, the balance remaining being net profits. In the case of life insurance every risk is valued, but in the case of fire insurance such a proceeding would be out of the question. The Courts have adopted the soundest method in fire insurance cases, although there is no method that can give an absolutely correct result; but the method followed by the Court below has been acted on since 1876—*Imperial Fire Insurance Co.* v. *Wilson* (2)—and has stood for thirty-two years as a good working method, and ought not to be disturbed.

Danckwerts, *K.C.*, in reply. The proper course is to send the case back for the Commissioners to find a true percentage as representing the unexpired risks, which should be taken to be 33⅓ per cent. of the premiums.

The House took time for consideration.

April 8. LORD LOREBURN L C. My Lords, in this case the appellants, a fire and accident insurance company, appeal against an assessment for income tax. The Commissioners arrived at the assessable profits by calculating income as the balance of receipts

(1) 16 R. 461. (2) 35 L. T. 271.

from premiums and other unquestioned sources over payments made in respect of losses and other unquestioned deductions. This balance they treat as the company's income for each of the three preceding years, and thence derive the average for which they assess the appellant company in respect of the year 1905-6.

On the other hand, the company claim that an allowance should be made for unexpired risks in the way following. They say that 33⅓ per cent. of the premiums received in any one year, say 1903, represents that part of the risk covered by such premium which runs on into the following year. Accordingly they seek to deduct from the gross income of, say, 1903 33⅓ per cent. of the premiums received in that year because it really represents the money they earn for taking risks which run on into 1904. But at the same time they add to the gross income of 1903 33⅓ per cent. of the premiums received in 1902, upon the ground that 1903 has in fact borne that proportion of the risks paid for in 1902.

Now, in my opinion, there is one sufficient reason for rejecting this contention. It is not found as a fact that 33⅓ per cent. does represent the real value of the risks that run on into 1904 in respect of premiums received in 1903. I am not prepared to assume that it is so, because of the statement of the Commissioners that it is the practice of insurance companies to estimate 33⅓ per cent. as the proper figure to represent that value. We are not told either for what purpose such an estimate is made, or that it corresponds with the reality. If I am to conjecture, I should incline to the view that this percentage is very far from the proper figure. For if this estimate be accepted, then in the three years 1902, 1903, and 1904, taken together, the total profit of this company, making certain deductions, was 15,338*l.*, whereas we know that for its own purposes the total profit, after the same deductions, was treated by the company as 62,850*l.*, and dividends were paid and moneys carried to reserve on that footing.

During thirty-two years, since the decision of *Imperial Fire Insurance Co.* v. *Wilson* (1), the method of assessing fire and accident companies has been that adopted by the Commissioners

(1) 35 L. T. 271.

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in the present case. It is not scientifically unassailable, for it obviously proceeds upon the supposition that the unexpired risks at the beginning and at the end of the year are in substance the same, or that, if an average of three years is taken, they are upon an average the same. But no method is scientifically unassailable that does not enter into an analysis of the contracts made and contracts current in each year so minute that it is in a business sense impracticable. I think the particular correction sought by the appellants in this case is indefensible upon the materials before us, and, further, that the method adopted by the Commissioners is a good working rule in the present instance and generally. If in any particular case an insurance company can shew it works hardship, no doubt the rule ought to be modified so that the real gains and profits may be ascertained as near as may be. I am for dismissing this appeal with costs.

LORD ASHBOURNE. My Lords, I concur with the Lord Chancellor.

LORD MACNAGHTEN. My Lords, your Lordships would probably agree with Mr. Danckwerts in thinking that the present mode of assessing the profits of a fire insurance company for the purpose of the income tax is neither accurate nor scientific. But it has been established for a very long time. It is simple, and it does not appear that in the long run it is productive of injustice. The alternative mode first proposed by the learned counsel for the appellants is certainly not more accurate. The inquiry afterwards suggested would, I think, be interminable. It is impossible to obtain anything approaching complete accuracy by any conceivable method. In a somewhat similar case—it was a rating case—Blackburn J., delivering the judgment of the Queen's Bench, after stating that the Court had endeavoured to lay down a rule more satisfactory than the one then in force, makes the following observations: "We have not, however, succeeded in laying down a rule which would be consistent with the existing legislation and decisions on this subject and would at the same time be capable of being satisfactorily worked, and we are strongly impressed with the

importance of not unsettling the law as established by past decisions where we cannot lay down a rule that is not open to exception": *Sheffield United Gas Light Co.* v. *Overseers of Sheffield.* (1)

I think there is much good sense in that observation, and I think it is apposite to the present case.

I think the appeal must be dismissed.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD ROBERTSON. I concur.

LORD ATKINSON. My Lords, I agree.

LORD COLLINS. My Lords, this is, in effect, an appeal after thirty-two years from the decision of the Court of Exchequer in 1876 in the case of *Imperial Fire Insurance Co.* v. *Wilson.* (2) In my opinion the proposed method of taking the accounts of the insurance company is open to the same objections that prevailed in that case, which has been acted upon in the interval. I am far from satisfied that it arrives at a result at all more approximately accurate than the less complex method suggested by the Legislature itself and adopted by the Commissioners. I am of opinion, therefore, that the appeal should be dismissed.

Ordered that the appeal be dismissed with costs.

Lords' Journals, April 8, 1908.

Agents for appellants: *Smiles & Co., for Bonar, Hunter & Johnstone, W.S., Edinburgh.*

Agent for respondent: *Sir Francis C. Gore, Inland Revenue, England, for Philip J. H. Grierson, Inland Revenue, Scotland.*

(1) (1863) 4 B. & S. 135-146. (2) 35 L. T. 271.

[PRIVY COUNCIL.]

J. C.* 1907 — *Nov.* 28; 1908 — *Jan.* 14.

COMMISSIONERS OF TAXATION FOR NEW SOUTH WALES . . . . . } PETITIONERS;

AND

BAXTER . . . . . RESPONDENT.

WEBB (COMMISSIONER OF TAXES FOR VICTORIA) . PETITIONER;

AND

(1.) CROUCH; (2.) FLINT . . . . . RESPONDENTS.

(THE ATTORNEY-GENERAL FOR THE COMMONWEALTH BEING INTERVENANT IN THE THREE CASES.)

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Practice—Special Leave to Appeal refused.

The High Court of Australia having decided, contrary to a decision of their Lordships, that a State had no power to impose income tax upon a salary paid by the Commonwealth to its officers, or to a member of the Commonwealth Parliament, resident in such State, the Commonwealth Parliament thereafter passed an Act expressly authorizing the States to impose such taxation:—

Held, that petitions for special leave to appeal from the High Court decisions must be refused, the amount at stake being inconsiderable, and the controversy having been closed.

THESE were three petitions for special leave to appeal from judgments of the High Court of Australia, dated June 7, 1907, and reported in 4 C. L. R. 1087. The first was by the Commissioners of Taxation for New South Wales, and the other two by similar officers for Victoria. They raised the same questions relating to income tax imposed by the State on the salary of a customs house officer for the Commonwealth received in New South Wales, and on the salary of a member of the House of Representatives and of a telegraph operator which were received in Victoria.

The first petition stated that the respondent Baxter had

* *Present:* LORD LOREBURN L.C., EARL OF HALSBURY, LORD MACNAGHTEN, LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

objected to his assessment before the judge of the Court of review of taxation, who gave judgment for the whole amount claimed, 23*l.* 18*s.* 8*d.* The High Court in appeal held that the salary was not liable to assessment, and refused to certify, under s. 74 of the Commonwealth Constitution Act, that the question at issue was one which ought to be determined by His Majesty in Council. The petition stated that the point had already been decided in favour of the States in the case of *Webb* v. *Outrim* (1), which was a case from Victoria, but that the High Court had held itself not bound by the decision of His Majesty in Council in any matters affecting the interpretation of the Constitution, and that on such matters it had co-ordinate jurisdiction with the Judicial Committee. The other petitions stated to a similar effect, but in the State of Victoria the cases came in the first instance before the Court of petty sessions at Melbourne.

Sir R. Finlay, K.C., and *Wise* (*K.C.* of New South Wales), *A. P. Poley*, and *Ronald Walker*, in support of the petitions, contended that these were cases in which special leave ought to be given. On the merits the High Court's decision was admittedly in conflict with the judgment of the Privy Council. Then there was the point as to the jurisdiction of the High Court to entertain these appeals direct. The Court of review in the first case and the police Courts in the other cases were not exercising federal jurisdiction, but jurisdiction conferred upon them under the Income Tax Acts of the respective States. No grant of federal jurisdiction to these Courts had been made by the Judiciary Act (No. 6 of 1903), s. 39. Reference was made to New South Wales Act 59, Vict. No. 15, Part VI., and to Victoria Income Tax Act, 1895, No. 1374, s. 26, to shew that those Courts were exercising a jurisdiction vested in them by State Acts as State Courts, and it was contended that the appeal lay to the Supreme Courts of the respective States, and not to the High Court: see also *Wollaston's Case* (2); *Deakin* v. *Webb* (3); *In re Income Tax Acts* (*Outrim's Case*). (4) It was submitted that, although the

(1) [1907] A. C. 81.
(2) (1902) 28 Vict. L. R. 357.
(3) (1904) 1 C. L. R. 585.
(4) (1905) Vict. L. R. 463.

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practical importance of the question of merits was greatly diminished by a recent Act of the Commonwealth enacting almost in terms of the recent Privy Council decision that Commonwealth officers should be liable to State taxation, yet that the point with regard to the High Court entertaining appeals direct from State Courts was one of considerable importance, and affected procedure in all the States. Moreover, the decision of the High Court was, by a bare majority of three to two, to the effect that they would not be bound by the decision of His Majesty in Council.

Danckwerts, *K.C.*, *Vaughan Hawkins*, and *R. R. Garran*, for the Attorney-General of the Commonwealth, were not heard, and their Lordships decided to refuse the prayer of the petitions, reserving their reasons.

1908 — *Jan.* 14.

On January 14, 1908, the reasons for the reports of their Lordships were delivered by

LORD LOREBURN L.C. Their Lordships intimated on November 28 last that they would state the reasons why they were unable to advise His Majesty to grant special leave to appeal.

The dispute between the parties was whether or not one of the Australian States could impose income tax upon a salary paid by the Commonwealth to its officers, or to a member of the Commonwealth Parliament, resident in such State. There had been decisions of State Courts in the affirmative. The High Court of Australia overruled these decisions, and when the whole matter came before His Majesty in Council in the case of *Webb* v. *Outrim* (1) this Board took the view that such taxation could be imposed, therein differing from the High Court.

Thereafter, in the present cases, the High Court entertained fresh appeals, and adhered to their former view.

The petitioners applied that special leave should be given to appeal to His Majesty in Council from that last determination of the High Court.

Before these petitions could be heard by their Lordships an Act of the Commonwealth was passed expressly authorizing

(1) [1907] A. C. 81.

States to impose taxation of the kind in question, so that the controversy cannot be raised again.

The sums actually in dispute or indirectly affected are inconsiderable in amount.

In these circumstances it would not be in accordance with the practice of this Board to advise His Majesty to grant special leave to appeal.

There will be no order as to the costs of these petitions.

Solicitors for the first petitioners: *Light & Fulton.*

Solicitors for the second and third petitioners: *Freshfields.*

Solicitor for the Commonwealth: *J. H. Galbraith.*

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NEW SOUTH WALES TAXATION COMMISSIONERS *v.* BAXTER.

WEBB *v.* CROUCH AND FLINT.

[PRIVY COUNCIL.]

QUEBEC IMPROVEMENT COMPANY . . . PLAINTIFFS;

AND

QUEBEC BRIDGE AND RAILWAY . . . DEFENDANTS.

J. C.* 1907 *Dec.* 2, 3. 1908 *Jan.* 24

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

(CONSOLIDATED APPEALS.)

Law of Arbitration—Arbitrators as to Value of Land expropriated also appointed Mediators—Award set aside—Terms of Submission exceeded.

Where arbitrators were appointed under deeds of submission to value three expropriated lots of ground and the indemnity for damages, it being declared that they should act as mediators (*amiables compositeurs*) but should be bound to conform to the provisions of art. 161 of the Railway Act, 1903, and the award in lieu of valuing the third lot in money ordered that the expropriators should return it in part and construct a road on their own adjoining land, to be maintained by them in perpetuity for the benefit of the parties expropriated.:—

Held, that arbitrators who are also appointed mediators cannot disregard their instructions, and that the error vitiated the whole award.

CONSOLIDATED appeals from two decrees of the above Court (October 5, 1906) from two decrees of the Superior Court for Lower Canada sitting at Quebec (February 27, 1906).

* *Present:* LORD MACNAGHTEN, LORD ROBERTSON, LORD ATKINSON LORD COLLINS, and SIR ARTHUR WILSON.

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These were two actions—one to recover from the respondents $28,245, the amount awarded to them for the value of lands taken from the appellants for the purposes of their railway; the other by the respondents to set aside the award. The Superior Court decreed that the appellants should recover; the Court of King's Bench set aside the award, which was to the effect stated in their Lordships' judgment.

The Superior Court held that the arbitrators, being mediators (*amiables compositeurs*), had power to condemn the respondents to surrender to the appellants the land used for the temporary road to Burrow Pit, and also to open the road called Concession Road for the benefit of the appellants.

The Court of King's Bench declared the award to be absolutely void, because it ordered, in lieu of a sum of money as compensation for the value of the land therein thirdly described, its return by the respondents to the appellants, after the construction of the railway, and, further, because it established, in favour of the appellants, upon the property of the respondents, a perpetual servitude.

The judgment of Cimon J. referred to the three lots of land expropriated, and says: "It is a complete expropriation in order that it (the bridge company) may become the *absolute proprietor*, to which the improvement company consents, and it is for this reason, that by the compromise it is stipulated that the arbitrators should value the three lots of land and fix the indemnity for the damages. The arbitrators could not do anything else. They had no authority to decide that the third lot should not be expropriated but should be given back in good order to the improvement company after the construction of the road; it had no authority to establish on the bridge and railway company's land the servitude in perpetuity, which it establishes. The award therefore goes in a sense beyond the powers given to the arbitrators, and this in an essential part which might affect, in the judgment of the arbitrators, to the detriment of the bridge and railway company, the amount which they would grant for the two first lots of land, and in another sense the award does not adjudge on all that was submitted to it, in this, that it does not value the third lot of land."

Sect. 161 of the Railway Act, 1903 (Canada, 3 Edw. 7, c. 58), is as follows: "The arbitrator or arbitrators, in deciding on such value or compensation, shall take into consideration the increased value, beyond the increased value common to all lands in the locality, that will be given to any lands through or over which the railway will pass, by reason of the passage of the railway through or over the same, or by reason of the construction of the railway, and shall set off such increased value that will attach to the said lands or grounds against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands as aforesaid—51 V., c. 29, s. 153."

Pelletier, K.C., and *Macmaster, K.C.*, for the appellants, contended that the award was not beyond the scope of the functions of mediators. Even if those functions were limited to the determination of a sum of money to be paid to the appellants in compensation and damages for the expropriation of the three lots of land, there is nothing inconsistent with the discharge of those functions in the course actually adopted by them. They relied on the declaration of the expropriating parties that they did not require one of the pieces of land, and that they would give it back, and that they would construct a short road on their own land. They took those matters into consideration, the advantages conferred on the appellants, the consequent reduction of the damages to which they were entitled, and allowed them their due weight in estimating the total damages awarded for the two lots of land which were completely expropriated. The directions given in the award were, it was contended, matters constructively submitted to the arbitrators, who, as mediators, were not subject to the strict rules of arbitration (see C. C. P., art. 1436), but were entitled to adjudge between the parties upon lines of natural justice and to give effect to concessions which, it was contended, the evidence shewed had been made before them by the expropriating parties. Reference was made to C. C. P. 404, 405, 411-13, 1431-44; *Great Western Railroad Co.* v. *Baby* (1);

(1) (1854) 12 Upp. Can. Q. B. Rep. 106, 114, 115.

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Bourgoin v. *La Compagnie du chemin de fer de Montreal, &c.* (1); *Rolland* v. *Cassidy* (2); *McGreevy* v. *Queen* (3); *Montreal, &c., Light and Power Co.* v. *Robert.* (4)

G. G. Stuart, K.C., and *Taschereau, K.C.*, for the respondents, contended that the arbitrators exceeded their powers, and that the award went beyond the terms of the submission. They failed to value all the lands which the respondents required, and they sought to impose on the respondents obligations which they were under no obligation to assume, and which the arbitrators had no power to impose. It is said that they had power as mediators. But mediators cannot go beyond the terms of submission, although art. 1436 says they are not required to decide according to the rules of law. That article did not empower them to neglect to value part of the land, and to order that it should be in part returned to the appellants, and that the respondents' land should be subjected to a perpetual servitude; or to order the doing of certain works in lieu of paying the money to be assessed. The neglect was in violation of the submission; the order overrode the appellants' exercise of statutory authority in taking the land in full proprietary right. The duty of the arbitrators was to value the three lots and award as compensation a fixed sum of money. As mediators their duty was not completely altered in the way suggested; and it was denied that any concessions were proved to have been made by them before the arbitrators which justified their award. Reference was made, besides the articles of the Code and the cases referred to by the appellants, to *Breakey* v. *Carter* (5); *Richelieu, &c., Navigation Co.* v. *Commercial Union Assurance Co.* (6) They also referred to s. 161 of the Railway Act.

Pelletier, K.C., replied.

1908 *Jan.* 24.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. These are appeals from the Court of King's Bench, Lower Canada.

The appellants, the Quebec Improvement Company, were the

(1) (1880) 5 App. Cas. 381.
(2) (1888) 13 App. Cas. 770.
(3) (1891) 19 Sup. Ct. Can. 180.
(4) [1906] A. C. 196, 201, 203.
(5) (1878) 4 Quebec L. R. 332.
(6) (1894) Quebec Rep. 3 Q. B. 410.

owners of three lots or pieces of land, in the immediate neighbourhood of Quebec, which the Quebec Bridge and Railway Company required for the purposes of their undertaking. The parties were unable to agree as to the price, and the matter was referred to arbitration. The result was an award which the railway company impeached by an action at law and the improvement company in a separate action sought to enforce. The Superior Court decided both actions in favour of the appellants. The Court of King's Bench reversed both judgments, and dismissed the appellants' action with costs. The improvement company appealed in both cases to His Majesty in Council. The appeals were consolidated, and now come before this Board for final decision.

The only question at issue is the validity of the award. For the determination of that question it will be sufficient to state the effect of the award and the purport of the submission to arbitration or deed of compromise as varied slightly by a subsequent deed.

The submission is dated March 24, 1905. It begins with a recital to the effect that the railway company, for the purposes of the construction of its railway, was obliged to expropriate the three lots of ground described in the deed and delineated on the plan annexed. It proceeds to state that the improvement company, wishing to avoid the delay of judicial proceedings, had proposed to refer the valuation of the said lots of ground and the indemnity for the damages to the decision of arbitrators, and that the friendly arbitration so proposed had been accepted by the railway company. Then each party names an arbitrator with power for the two arbitrators to choose a third. The submission ends by declaring that the three arbitrators should be bound and obliged strictly to conform themselves to the provisions of the Railway Act of Canada relating to the expropriation of lots of ground in similar cases, and that their decision should be final and without appeal and binding for all parties.

A third arbitrator was appointed by the two arbitrators named in the submission, and on June 29, 1905, the deed of March 24, 1905, was modified by a deed of that date, which declared that the arbitrators should act as mediators (*amiables compositeurs*),

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but that they should be bound to conform to the provisions of art. 161 of the Railway Act, 1903. It was also declared that the parties renounced the ordinary procedure of a judicial arbitration, such as the production of witnesses, the employment of advocates and other judicial formalities, reserving the right to produce documents before the arbitrators.

On July 12, 1905, two of the arbitrators made the award which is now impeached. The arbitrator named by the railway company did not concur.

So far as regards two of the three lots of ground, the award does not appear to be open to objection. As regards the third lot, the award is to the following effect:—

Messrs. Tanguay and Sirois, forming the majority of the arbitrators (Mr. McCarthy not concurring), declare that the railway company should (as its arbitrator and its representatives declared that it ought to do)—

1. Restore to the improvement company, after the construction of the railway and the bridge, in good order that part of the land containing an acre and eighty-four hundredths of an acre marked on the plan as "Temporary line to Burrow Pit."

2. Establish on their land on the east side to the place marked on the plan for the benefit and advantage of the improvement company the road marked as "Concession Road," and containing forty-four hundredths (0·44) of an acre, to the end that the improvement company may have access by the road on foot and by carriage for all time and in perpetuity from that part of their property lying to the east of the railway to the public road.

On October 5, 1906, the Court of King's Bench delivered judgment in favour of the railway company on the ground that the award went beyond the powers conferred on the arbitrators in that—(1.) it awarded (in lieu of valuing in money the third lot of land) that the railway company should, after the construction of the line of railway and the bridge, be bound to restore it in good order to the improvement company; and (2.) that it imposed a servitude of way in perpetuity over the land of the railway company, and that the award was, therefore, void in toto and illegal.

Their Lordships see no reason to differ from the judgment of

the Court of King's Bench. As regards the third lot of ground, it is obvious that the arbitrators have not followed or attempted to follow the directions contained in the submission or deed of compromise. Arbitrators who are also appointed mediators are not obliged to adhere to legal formalities—mere irregularities are excusable—but they cannot disregard the instructions given them in the deed under which they purport to act.

The suggestion which appears on the face of the award that the order of the arbitrator does no more than carry out the intentions of the railway company, as expressed by their own arbitrator and their duly authorized representatives, is not supported by the evidence to which their Lordships' attention was called. Nor is there, in their Lordships' opinion, any substance in the argument founded on certain words appearing on the plan annexed to the submission. Those words are merely words of description, and it is quite clear that they were not placed on the plan for any purpose connected with the arbitration.

Their Lordships agree with the Court of King's Bench in thinking that the error which the arbitrators have committed vitiates the whole award.

Their Lordships will therefore humbly advise His Majesty that these appeals should be dismissed.

The appellants will pay the costs of the appeals.

Solicitor for appellants: *Fred. F. Macnaghten.*
Solicitors for respondents: *C. Russell & Co.*

[PRIVY COUNCIL.]

J. C.* 1907 Dec. 4, 5. 1908 Feb. 12.

DOUGLAS-MENZIES . . . . . APPELLANT;

AND

UMPHELBY AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Right of Election—Estates in Scotland and Australia—Two separate Wills forming one Scheme of testamentary Intention—Testator's Widow electing to take against one cannot claim under the other—Right to equitable Compensation.

By two testamentary instruments, called respectively a British will and an Australian will, a testator domiciled in Scotland made a complete disposal of his estates, British and Australian, directing that the British will should be construed and administered according to the law of Scotland, the Australian will according to the law of New South Wales. His widow, on his death without issue, obtained a decree of the Court of Session in Scotland establishing her legal right in name of jus relictæ and terce, with consequential relief, the Court declining jurisdiction as against the Australian trustees. Under a summons issued in the Supreme Court of New South Wales by the respondent trustees of the Australian will, the widow claimed the beneficial dispositions in her favour contained therein; the Court decided in her favour, and an appeal therefrom was instituted by the above appellant, party thereto, who took beneficially under the Scottish will, but not under the Australian:—

Held, that the two instruments formed one will containing a coherent scheme of intention, and that the widow, having elected to defeat the will in part, could not claim under it, and accordingly took no interest under the Australian will.

Held, also, that the appellant had a locus standi to maintain the appeal, being interested in protecting the Australian estate in order to compensate those who had been deprived of benefits under the will by the widow's election.

APPEAL from an order of the Supreme Court (November 29, 1906), made under an originating summons taken out by the respondent Umphelby, executor and trustee of the testator's Australian will.

The summons was directed to ascertain the rights of the

* *Present:* LORD MACNAGHTEN, LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

testator's widow under the Australian will, having regard to the circumstances hereinafter appearing.

The testator, James Henry Douglas, was married in Scotland in 1883, and died domiciled in Scotland on May 6, 1905. He left no children. Prior to the marriage the parties subscribed an ante-nuptial contract, dated July 26, 1883, under which certain provisions were made in favour of the respondent Mrs. Douglas, but which did not contain any renunciation or discharge on her part of her right to jus relictæ or terce. On the contrary, the ante-nuptial contract contained the following clause: "And it is also declared that the provisions hereby conceived by the said James Henry Douglas in favour of the said Sibella Susan Hill shall not in any way be held as in full of her terce jus relictæ or other marital rights which she could legally claim from the representatives of the said James Henry Douglas but in the event of the said James Henry Douglas dying intestate shall be only reckoned as a payment to account of her legal share. And in the event of his leaving a will or deed of settlement shall unless specially mentioned in such will or deed of settlement be held to be over and above the provisions in her favour in such will or deed of settlement."

On December 18, 1903, Mr. Douglas executed two deeds of settlement, by which he disposed of his means and estate. Both were prepared and executed in Scotland.

By the first of these deeds of settlement (hereinafter referred to as the British will) Mr. Douglas assigned to Mrs. Douglas, William Beveridge, and the appellant (then and since resident in Scotland) his whole estates, means, and effects situated within Great Britain, and appointed the same persons his executors in Great Britain. The purposes of the trust, so far as material, were—(*a*) to provide for a payment to Mrs. Douglas of 5000*l.* sterling, and to direct his trustees to set apart the sum of 100,000*l.* as a life rent provision for her under the declaration that it should be accepted "as in lieu and in full satisfaction to her of the said provision in her said contract of marriage"; (*b*) on Mrs. Douglas' death or re-marriage to pay or convey the fee or capital of the said sum of 100,000*l.* as therein mentioned; (*c*) to pay or convey the fee or capital of the free

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residue of his (the testator's) said estates situated in Great Britain to the appellant absolutely. The British will also contained the following clause: "And I declare that whatsoever may be my domicile at the date of my death these presents shall be construed and administered according to the law of Scotland."

By the second of the deeds of settlement (hereinafter referred to as the Australian will) Mr. Douglas conveyed to Mrs. Douglas, the appellant, the respondents Archibald Menzies and Umphelby the whole estates and effects situate in Australia which should belong to him at the time of his death, and appointed the same persons his executors in Australia. By the third purpose of the Australian will the testator directed his trustees—(*a*) to set apart and invest 100,000*l*., and, in the event of his wife surviving him, to pay her the free annual produce thereof, with a provision that the life rented sum should be restricted to one-half in the event of her re-marrying; (*b*) on Mrs. Douglas' death to pay or convey the fee or capital of the said sum of 100,000*l*. or 50,000*l*., as the case might be, as therein mentioned; (*c*) to divide the free residue of his estates among or for the benefit of certain beneficiaries therein mentioned. The Australian will also contained the following clause: "And I direct and declare that these presents shall be interpreted and that this trust shall be administered according to the law of New South Wales." On October 12, 1905, the respondent Mrs. Douglas commenced an action in the Court of Session in Scotland against herself and the said William Beveridge and the appellant, as trustees and executors of the British will, and against herself and the appellant and the respondents Archibald Menzies and Harold Umphelby, as trustees and executors of the Australian will, claiming by the conclusions of the summons—(1.) a declaration that the testator was at the date of his death a domiciled Scotsman; (2.) a declaration that she was entitled to payment of one-half the net amount of his net movable or personal estate in name of jus relictæ, and also to payment of one-third of the free revenue of the lands and other heritable property in which he was infeft at his death in name of terce; (3.) against the trustees of the British will accounts of the testator's estate so far as falling under their

charge, to enable the amount of such jus relictæ and terce to be fixed, and payment and ancillary relief, and, against the trustees of the Australian will, accounts of the said estate, so far as falling under their charge, to enable the amount of such jus relictæ to be fixed, and payment thereof and ancillary relief. The said Archibald Menzies and Harold Umphelby, as trustees of the Australian will, pleaded, amongst other things, that the Court had no jurisdiction.

On January 11, 1906, the Lord Ordinary found and declared that the testator was at his death a domiciled Scotsman, and that Mrs. Douglas was entitled to payment of one-half the net amount of his movable or personal estate in name of jus relictæ, and also to payment of one-third of the free revenue of the lands and other heritable property of which he was infeft at his death in name of terce; and ordered them to produce accounts as asked by the summons. As regards the respondents Archibald Menzies and Harold Umphelby, he upheld their plea of no jurisdiction, and dismissed the action so far as they were concerned.

Mrs. Douglas thereupon claimed of the Australian trustees that she was entitled to take the benefits conferred upon her by the Australian will; and, in the alternative, to jus relictæ in respect of the testator's Australian personalty and dower out of his Australian real estate.

On the hearing of the originating summons, which was in consequence of this claim issued by the respondent Umphelby, Cohen J. on November 29, 1906, declared that Mrs. Douglas was not estopped by reason of her claim and the judgment in the said Scottish action from claiming the benefit of the beneficial dispositions made in her favour by the testator in the Australian will out of the real and personal estate of the testator in Australia; and that she was entitled under the Australian will to an estate for life in the sum of 100,000*l.* as therein mentioned. The main ground of this decision was that, though Mrs. Douglas had claimed her jus relictæ out of the movable estate both in Scotland and Australia, the judgment of the Court of Session was "directed only to the British estate," and did not deal with the Australian estate or trustees. Cohen J. held that the Australian will was governed by the law of New South Wales, and that under

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the circumstances he must exclude from consideration the rule that where the man is domiciled at his death his personal estate should be deemed to be situated. He thought it would defeat the objects of the testator if, by applying the law as to domicil, part of the Australian property should be distributed by Scottish and part by New South Wales law.

Levett, K.C., and *Alfred Adams*, for the appellant Douglas-Menzies, contended that this decision should be reversed, and that in lieu thereof it should be declared that Mrs. Douglas is, in the events which have happened, entitled to jus relictæ out of the testator's movable estate wheresoever situate, and not to any benefit under his said wills or either of them. The testator had executed two testamentary documents, called respectively the British and Australian wills, but that course was adopted simply for convenience of administration. The two wills must be read together as forming one testamentary disposition, which covered the whole of his estate, and, as far as disposition was concerned, might have been contained in one instrument. It followed that a beneficiary thereunder ought either to give effect to them as a whole or else take no benefit under either of them. The widow was bound to elect between the benefits thereby conferred on her and her common law rights in opposition to the whole will of jus relictæ and terce. The whole movable estate of the testator was in contemplation of law situate in Scotland, and the jus relictæ in respect thereof was an indivisible right, and Mrs. Douglas, having elected to take it in Scotland, elected to take it wherever it was actually situated. The judgment of the Lord Ordinary so decided, for in disclaiming jurisdiction over the Australian trustees and estate he did not limit his judgment solely to the British estate, but made a general declaration of right; and the widow was bound by her own successful contention before him. There was no conflict of law in this case, for by the law of New South Wales succession to the whole movable estate was governed by the law of the testator's domicil at the time of his death, and the law of that domicil compelled election as contended for. With regard to there having been only one testamentary disposition in this case,

whether or not two or more instruments had been executed, reference was made to *Townsend* v. *Moore*. (1) The ordinary practice is to prove one will and have an authenticated copy of the other: see *In the goods of Astor* (2); *In the goods of Bolton* (3), where both wills were proved as together constituting the last will of the deceased; *In the goods of De la Rue* (4), where the old practice was resorted to. As regards the widow's right and duty of election, founded on the Scottish doctrine as to approbate and reprobate, see *Black* v. *Watson*. (5) The appellant was not interested in the Australian estate under the will, but as a person prejudicially affected by the widow's election he was interested in the bequests to her under the Australian will being duly applied in compensating himself and others who were disappointed of the benefits intended for them by the testator. As to his right to equitable compensation, see *Hervey's Trustees* v. *Hervey's Trustees* (6) [LORD ROBERTSON referred to *Ker* v. *Wauchope* (7)]; *Stewart, &c.* v. *Stephen*. (8)

Dunham, for the trustee of the will.

Younger, K.C., and *Austen-Cartmell*, for the respondent Mrs. Douglas, contended that, as the testator had directed in his Australian will that the same should be interpreted, and the trusts thereof administered, according to the law of New South Wales, it followed that she was entitled to have the benefit of all beneficial dispositions therein contained out of his Australian estates. She was not estopped from claiming them by reason of her claim made before the Court of Session and of the judgment which she had obtained. In her claim so made—that is, to her legal rights of terce and jus relictæ—she expressly reserved her rights as against the Australian trustees as to the real estate in Australia, but claimed her jus relictæ out of the movable estate both in Scotland and in Australia. The Australian trustees also insisted that the two wills and the trusts thereof were separate and independent, denied the jurisdiction of the Court of Session over their trusts, and challenged the widow's right to her jus

(1) [1905] P. 66.
(2) (1876) 1 P. D. 150.
(3) (1887) 12 P. D. 202.
(4) (1890) 15 P. D. 185.
(5) (1841) 3 D. 522.
(6) (1863) 1 Macph. 345.
(7) (1819) 1 Bli. 1.
(8) (1832) 11 Shaw, 139.

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relictæ or terce out of the Australian estates. The widow only succeeded as against the British trustee; as against the Australian trustees her suit was dismissed. The decree was only directed to the British estate, leaving the widow entitled to elect whether she will take under the Australian will or against it. The Court of Session only dealt with the personal estate situate in Scotland, declining at the instance of the Australian trustees to exercise any jurisdiction over them or the estate in their hands, either real or personal. Although by the law of New South Wales a man's personalty is situated wherever he is domiciled, and accordingly the widow's jus relictæ would attach to it, still the widow is entitled to waive that right and claim under the will; and, as she does so, the Australian will must be wholly administered by the law of New South Wales, and not in part by the law of Scotland, as contended for by the appellant. The testator's object would be defeated unless the two wills, with their separate trusts and trustees, are kept entirely distinct and separately administered. It is because the two wills are entirely different, with different trustees, provisions, and applicable law, that the widow must be deemed, in accordance with the intention of the testator, to be entitled to take under the one and against the other.

E. Le Riche (*Upjohn, K.C.*, with him), for the respondent Archibald Menzies.

Levett, K.C., replied.

1908 *Feb.* 12.

The judgment of their Lordships was delivered by

LORD ROBERTSON. James Henry Douglas, who died on May 6, 1905, was a domiciled Scotsman. He was survived by his wife (who will be called the respondent), but he left no issue. He died possessed of estate of great value, both real and personal, in Great Britain and in Australia. His testamentary dispositions are contained in two instruments in Scotch form, executed on the same day, each of which is a trust disposition and settlement. The one relates exclusively to British estate, and the other exclusively to Australian estate. (Codicils were subsequently executed to each trust disposition, but these do not affect the questions now to be considered.) Each trust disposition sets up a separate

body of trustees, as was highly convenient where the one estate was in one hemisphere and the other in another. Each instrument successfully aims at equipping an independent administration of the estate dealt with by it, according to local conditions. In the British deed the testator declares that "whatever may be my domicile at the date of my death these presents shall be construed and administered according to the law of Scotland." In the Australian deed the words are, "And I direct and declare that these presents shall be interpreted and that this trust shall be administered according to the laws of New South Wales."

What is material to observe about these two instruments is that, taken together, they form a complete disposal of the testator's estate.

The next matter to be ascertained is, What were the rights of the respondent, as a Scotch widow, *vis-à-vis* to this testamentary disposal of her husband's estate? Alike under the British and the Australian deeds, very large bequests were made to her if she chose to take them. On the other hand, she had the right to reject those bequests and betake herself to her legal rights as a Scotch widow. These legal rights may be, and very often are, renounced at marriage, conventional provisions being accepted in place of them, but this was not the case of the respondent, the conventional provisions being expressly stated not to be in full of terce and jus relictæ. It is superfluous to say that this only reserved to the respondent her right to claim her legal rights, and in no way affected the consequences of such claim being made.

Now, the legal right of the widow of James Henry Douglas, there being no children, was to one-half of his personal estate and to a life interest in one-third of his real estate. The respondent chose to assert her legal right, and she has taken a decree of the Court of Session establishing it. She has now gone on to claim the bequests made to her in her husband's Australian will; and the judgment of the Supreme Court of New South Wales, now under appeal, is a finding that she is not estopped from claiming the beneficial dispositions in her favour made by the testator in his Australian will, and that she is entitled under the Australian will to an estate for life in the sum

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of 100,000*l.* mentioned in the said will, notwithstanding the claim of the respondent in the Scotch Court and the judgment of the Court of Session.

In considering the merits of the decision appealed against, it is well to remember what is the doctrine of approbate and reprobate invoked by the appellant. Although the name is different, the principle—as was laid down by Lord Eldon in *Ker* v. *Wauchope* (1)—is the same as that of the English law of election. It is against equity that any one should take against a man's will and also under it. This rests on no artificial rule, but on plain fair dealing. If any one has the right by law to take a share of a testator's estate, which the testator has not given but has otherwise disposed of, that person takes it against the will and cannot go on to found on the will and claim its benefits.

All this is so plain in principle and so easy of application that it is difficult to hear of the decision under appeal without surprise. The learned judge has stated his reason with perfect clearness, so that it is easy to judge of its validity. He thinks that the testator made two wills and separated his British and Australian estates for the purposes of administration and succession. He thinks that it would be defeating the objects of the testator if part of the property situated in Australia should be distributed by Scotch and part by New South Wales law.

To their Lordships it appears that this view is fallacious. In the first place, it attaches to the existence of the "two wills," and to one clause in the Australian will, an importance which does not belong to them; and it loses sight of the true principle of the doctrine of approbate and reprobate.

Now, if the two wills be examined, cursorily or carefully, it will be seen that they might perfectly well and with unimpaired effect have had all their provisions incorporated in one continuous document. The only inconvenience would have been that each body of trustees would have carried about with them a great deal of writing with which they had no concern. If, then, the matter which now forms two instruments had taken the form suggested and been one will, the argument of the respondent would be

(1) 1 Bli. 1.

impossible, and thus owes its existence to the merest matter of form.

Nor does the judgment find more substantial support from the clause about Australian law. The scheme of the testator was simply that the administration of each part of his estate should be local and unhampered by the necessity of crossing the seas to solve questions of administration as they arose. The clause founded on is merely one of machinery.

Even supposing, however, that the two trust dispositions be treated as separate and independent to the fullest extent, there remains unanswered by the respondent the real and radical objection to her case. Whether a man leaves one testamentary writing or several testamentary writings, it is the aggregate or the net result that constitutes his will, or, in other words, the expression of his testamentary wishes. The law, on a man's death, finds out what are the instruments which express his last will. If some extant writing be revoked, or is inconsistent with a later testamentary writing, it is discarded. But all that survive this scrutiny form parts of the ultimate will or effective expression of his wishes about his estate. In this sense it is inaccurate to speak of a man leaving two wills; he does leave, and can leave, but one will. And when the law of approbate and reprobate is applied it is this, the net result of the testamentary writings, which the doctrine protects from invasion.

Applying this principle to the present case, it is manifest that the two testamentary writings of Mr. Douglas form a coherent scheme of intention, and that the respondent, having defeated it in part, cannot claim to take under it.

An attack was made on the locus standi of the present appellant. He takes beneficially under the Scotch, but not under the Australian, disposition. It is, however, quite clear that if the principle of approbate and reprobate applies, then so does the correlative rule of equitable compensation, and the appellant is therefore interested to protect the Australian estate. In truth the question of locus standi is really the same question in another form.

Their Lordships will humbly advise His Majesty to allow the appeal and to make an order in terms of the following minutes,

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which are framed in accordance with the order of the House of Lords in *Codrington* v. *Codrington* (1):—

Discharge the order of the Supreme Court;

Declare that the respondent Sibella Susan Douglas was bound to elect between her rights under Scottish law as widow of the testator and the benefits given to her by the testator in the general disposition of his estate contained in the instruments described as the British will and the Australian will;

Declare that the said respondent, having claimed her legal rights in the Court of Session in Scotland, and having established her claim by the decree of that Court, is to be considered as having elected to take against the general disposition made by the testator of his estate, and that consequently she is not entitled to the income of the 100,000*l.* to be provided as mentioned in the Australian will or to any other interest under that will, but that all the interest to which, if she had not so elected, she would have been entitled under the Australian will ought to be applied in making compensation to the persons disappointed by her election of the benefits of which they respectively have been or will be deprived by her election so far as the same shall extend and until such compensation shall be fully made;

Liberty for any of the parties and any persons interested under the last preceding declaration to apply to the Supreme Court for such inquiries and directions as may be necessary in order to give effect to the same, and generally as they may be advised.

Costs of all parties of and incident to the appeal to be dealt with and disposed of by the Supreme Court.

Solicitors for appellant: *Crawford, Cheston & Slade.*

Solicitors for respondent trustee: *Murray, Hutchins, Stirling & Murray.*

Solicitors for Mrs. Douglas: *Nisbet, Daw & Nisbet.*

Solicitors for respondent Archibald Menzies: *Joseph & Hyam.*

(1) (1875) L. R. 7 H. L. at p. 868.

[PRIVY COUNCIL.]

SPENCER . . . . . PLAINTIFF;

AND

REGISTRAR OF TITLES . . . . . DEFENDANT.

J. C.*
1907
Dec. 4.
1908
Jan. 24.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Western Australian Transfer of Land Act, 1893—*Wrongful Registration—Measure of Damages—Value of Buildings when Plaintiff's Title accrued.*

An Order in Council declared that the plaintiff, who was a remainderman, was entitled to damages under the Transfer of Land Act, 1893, for deprivation of title to the land in suit by reason of a certificate wrongfully issued to F. in 1875, and that the plaintiff's cause of action arose in 1903. It then remitted the case for the assessment thereof:—

Held, overruling the Court below, that the damages must be measured by including the value of the buildings on the land at the date when the cause of action accrued, and that the value of the buildings erected after the date of the certificate and before the accrual of the cause of action could not be excluded.

APPEAL from an order of the Supreme Court (October 29, 1906) as to the measure of damages which the appellant was entitled to recover.

It was decided by a judgment of their Lordships (1) that the appellant was entitled to damages under the Transfer of Land Act, 1893, in respect of a certificate of title issued by the registrar on December 16, 1875, to Farrelly, who had become thereunder a registered proprietor of the land in suit. It was referred to the Court below to ascertain the measure of the said damages. The judgment decided that the appellant's cause of action arose on June 25, 1903, the date of the death of the tenant for life, that being the date of the appellant's deprivation of title. The appellant claimed that the value of buildings erected on the said land between the dates of December, 1875,

* *Present:* LORD MACNAGHTEN, LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

(1) [1906] A. C. 503.

J. C. 1907

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and June, 1903, should be included in such damages. He contended that his title to the land at the death of the tenant for life included a title to the buildings thereon on that date. The respondent contended that the values of those buildings should be excluded, and the Supreme Court decided in his favour.

By s. 207 of the Act of 1893 (56 Vict. No. 14) it was provided that: "Any person who shall have sustained or shall hereafter sustain any loss or damage in or by the exercise by the Commissioner of any of the powers conferred on him by 'The Transfer of Land Act 1874' or by this Act and who shall not have been party or privy to the application or dealing in connection with which such power was exercised may notwithstanding the provisions of section 201 and section 205 of this Act and without prejudice to the rights (if any) of such person thereunder in the first instance and without any obligation to pursue the remedies provided by such sections bring an action against the registrar as nominal defendant for recovery of damages and may recover the damages awarded together with the costs of the action out of the assurance fund. And where such person shall have been party or privy to such application or dealing he shall be at liberty to join the registrar as a nominal co-defendant in any action brought by him in respect of such loss or damage against any other person or persons who shall have been party or privy to such application or dealing and all damages and costs recovered against the registrar in such action whether by the plaintiff or a co-defendant may be recovered out of the assurance fund."

By s. 211 it is provided that: "No action for the recovery of damages sustained through deprivation of land or of any estate or interest in land shall lie or be sustained against the registrar or against the insurance fund or against the person upon whose application such land was brought under the operation of this Act or against the person who applied to be registered as the proprietor in respect of such land unless such action shall be commenced within the period of six years from the date of such deprivation."

The reasons for the judgment of the Court below are thus stated by McMillan J.:—

"The intention of the Legislature was to give to any person

deprived of land or of any estate or interest in land, compensation for the actual loss sustained by him. If he is a person who could but for the Act have brought an action for the recovery of the land, the right to bring an action for damages may give him more or less than he would have gained in an action of ejectment. If buildings have been placed on the land after the wrongful registration and before the accrual of the right of action I can see no reason for adding to the value of the land of which the plaintiff was deprived the value of buildings which were not in existence at the time of the wrongful act, which is the foundation of the cause of action. To give the value of the buildings under such circumstances would be to give compensation for the loss sustained and to add to that compensation the value of something which was never in fact lost by the plaintiff and which only came into existence in consequence of the wrongful registration which enabled the owners for the time being to spend their money with the certainty that they had an indefeasible title. In a case of this kind the loss sustained is less than the value of that which could have been recovered in ejectment. If however the block in question instead of being vacant at the time of the registration had had valuable buildings or timber on it which had been removed before the plaintiff was entitled to sue, he might in some cases obtain damages in excess of the value of the land at the time when the action was brought. The measure of damages in this case is the actual loss sustained by the plaintiff, who complains of the wrongful registration. He is entitled to the value of that which he has in fact lost, and the value is in my opinion to be estimated at the date of deprivation."

Upjohn, K.C., and *W. Higgins*, for the appellant, contended that the appellant's claim fell within s. 207 of the said Act, and that the date at which he sustained deprivation of title was June 25, 1903. That, accordingly, was the date at which the land should be valued, together with all buildings thereon, regardless of the dates at which they had been erected.

Astbury, K.C., and *P. S. Stokes*, for the respondent, contended that December 16, 1875, was the date at which the appellant

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was deprived of his reversionary title, and that the true measure of his loss was the value on June 25, 1903, of the land of which he was deprived on the earlier date, independently of any intermediate increase thereof which might have been effected by the registered owner since he obtained possession. Farrelly's improvements did not increase the loss occasioned to the appellant by the wrongful registration in December, 1875. The appellant never had any title to the buildings erected by Farrelly, and had incurred no loss by not obtaining them.

Counsel for the appellant were not heard in reply.

1908 *Jan.* 24.

The judgment of their Lordships was delivered by

LORD ATKINSON. This case comes before their Lordships for the second time.

The action was originally brought by the appellant against the then Registrar of Titles under the Transfer of Land Act, 1893, to recover damages for being deprived of a certain parcel of land situate at Perth, in the State of Western Australia, described as Perth Town Lot P. No. 8, of which one Terence Farrelly had become the registered proprietor, and in respect of which a certificate of title had on December 16, 1875, been granted to him.

The title to this parcel of land set up by the plaintiff, and in respect of which he claimed, was as sole surviving trustee of a settlement, dated October 6, 1846, made on the inter-marriage of his father and mother, and also as beneficial owner thereunder, subject to the life estate of his father, who had outlived his mother, and died on June 25, 1903. A special case was stated in the action, and the questions which came before their Lordships for consideration on the first occasion were the following :—

1. Is the contention of the plaintiff (the appellant) right? And is he entitled to claim for deprivation of title by reason of the grant of a certificate of title to Terence Farrelly?

2. Is the plaintiff's alleged claim barred by s. 211 of the Transfer of Land Act, 1893?

3. If the answer to the first question be in the affirmative, and the answer to the second question in the negative, what is the measure of damages to which the plaintiff is entitled?

Their Lordships then decided humbly to advise His Majesty that the first of these questions should be answered in the affirmative, the second in the negative, and that all further proceedings in the action should be remitted to the Supreme Court of Western Australia. (1)

The following passage occurs in the judgment, which was delivered by Lord Davey (2): "Their Lordships are further of opinion that the title of the appellant to commence this action accrued on the death of Spencer, when the trust for sale came into operation. And in that case the learned counsel for the respondent admitted that the appellant was not barred by s. 211 of the Transfer of Land Act, 1893."

The third question so remitted having come on for consideration before the Supreme Court, an issue was raised as to whether in assessing the damages to which the plaintiff was entitled for the loss and deprivation of his land there ought to be included the value of certain buildings erected upon it between the month of December, 1875, when Farrelly became the registered proprietor, and the month of June, 1903, when the plaintiff's beneficial interest would have come into possession. The Supreme Court decided this issue in favour of the defendant, and by order dated October 29, 1906, directed that the answer to the third question in the special case should be that the measure of damages to which the plaintiff was entitled was the value of Perth Town Lot P. No. 8 on June 25, 1903, exclusive of the buildings erected after December 16, 1875. From this order the present appeal to this Board has been taken.

The statute under which the certificate was granted was repealed, and practically re-enacted, by the Transfer of Land Act, 1893. And it is upon the construction of s. 207 of the latter statute that the question for decision turns.

This section runs as follows: "Any person who shall have sustained or shall hereafter sustain any loss or damage in or by the exercise by the Commissioner of any of the powers conferred on him by 'The Transfer of Land Act, 1874,' or by this Act . . . . may . . . . bring an action against the registrar as nominal defendant for recovery of damages, and may recover

(1) See [1906] A. C. 503. (2) [1906] A. C. at p. 510.

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the damages awarded, together with the costs of the action out of the assurance fund."

It is admitted that the plaintiff has been deprived of his estate and interest in this parcel of land, and has therefore sustained "loss or damage" through the exercise by the Commissioner of his powers under the Act. The question is, How is the loss or damage to be measured? Is it to be measured by reference to the value of the plot of land in the state in which it existed on December 16, 1875 (the date of the certificate), that is, of course, with any buildings then erected upon it, or by reference to its value on June 25, 1903, when Henry Spencer, the tenant for life, died, in its then existing state, that is, with the buildings upon it at this latter date? It is obvious that the damages must be measured with reference to the one or to the other of these standards. There can be no third. This Board has already decided that the plaintiff's right of action only accrued on the death of the tenant for life, but that must have been because it was considered that he only then sustained the "loss or damage" in respect of which he was by the statute enabled to sue. If that be so, this "loss or damage" must be measured by the value of the land in the state in which it was at the time when he was to be taken to have been deprived of it; that is, of course, with the buildings then upon it. The question therefore is, in reality, covered by the former decision of this Board.

Their Lordships are accordingly of opinion that the decision of the Supreme Court is erroneous, and the order of October 29, 1906, illogical, in this, that, while it, in effect, awards damages to the plaintiff in respect of any enhancement of the value of the land which may be due to the progress of events from December 16, 1875, to June 25, 1903—thereby recognizing that he was at this latter date deprived of his interest and suffered his loss—yet it withholds from him all damages in respect of the value of the buildings which had been erected upon it during that period, and which, in law, belong to it.

Their Lordships will therefore humbly advise His Majesty that this appeal be allowed, and the above-mentioned order of October 29, 1906, be varied by striking out therefrom the words "exclusive of the buildings erected after the 16th day of

December, 1875," and inserting immediately after the words "Perth Town Lot P. No. 8" the words "with the buildings thereon."

The respondent will pay the costs of this appeal.

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Solicitor for appellant: *H. Danger.*

Solicitors for respondent: *Sutton, Ommanney & Rendall.*

[PRIVY COUNCIL.]

MUNICIPALITY OF BULAWAYO . . . . DEFENDANTS;

AND

BULAWAYO WATERWORKS COMPANY, LIMITED . . . . . PLAINTIFFS.

J. C.* 1908 *Feb.* 13, 14; *March* 18.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Construction of Contract—"Generating Light" includes Distribution as well as Production—"Actual Cost" includes Depreciation, Rent, Rates, Taxes, and Insurance.

The respondents were under contract to establish an electric light central station in B., and to supply light to the inhabitants and to the streets, public places, and private property, and, in order to carry out that undertaking, to do certain specified things and to provide everything which might be necessary, whether specified or not, for the purpose of supplying electric light to the street lamps. In consideration thereof the appellants by the same contract were bound to pay "at such rates as will yield to the contractors a return equal to 10 per cent. over the actual cost of generating the light":—

Held that, according to the true construction of this contract, "generating the light" covered the whole series of operations leading up to the production of the light in the street lamps, and the "actual cost" thereof covered all that the production of the light cost, including depreciation of plant, rent, rates, taxes of the electric works and buildings, and insurance.

APPEAL from a decree of the Supreme Court (November 5, 1906) substantially affirming a decree of the High Court of Southern Rhodesia (April 6, 1906).

* *Present:* THE EARL OF HALSBURY, LORD MACNAGHTEN, LORD ATKINSON, and SIR ARTHUR WILSON.

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The contractors, now represented by the respondents, under an agreement with a company now represented by the appellants, undertook to set up and maintain an electric light station at Bulawayo, and therefrom to supply the inhabitants of that town and suburbs with electric light and power, and obtained a concession for that purpose. The respondents carried on two undertakings, namely, the supply of water and the supply of electricity, the latter being regulated by the said agreement, clause 20 of which prescribed the terms under which the respondents bound themselves to light the streets and public places of Bulawayo.

During the quarter-year ending with December 31, 1904, the respondents supplied to the appellants for the purpose of street lighting 12,665 units of electricity. In addition to supplying current the respondents were bound under their contract to supply and fix the lamps, lamp-posts, wires, and other parts of the necessary distributing plant. It was admitted that in all respects they had fulfilled their contract and were entitled to be paid the amount specified in the agreement as the price thereof; that is to say, at such a rate per unit as would yield to them a return equal to 10 per cent. over the actual cost of generating the light. The question between the parties was as to the propriety of including as items of such actual cost certain sums with which this branch of its business had been debited by the officers of the respondent company; in particular, the sum of $3\frac{88}{100}$ pence per unit, being an estimated charge for depreciation of plant, and a sum of sixty-eight hundredths of a penny per unit for rent, rates, and taxes, including a proportion for the expense of fire insurance. There was also an item, the amount of which had not been separately ascertained, but was included under the heads of wages, repairs, and maintenance and management, in the account rendered by the respondents, which represented the cost of distributing the light through the town as distinct from the cost of generating the current at the respondents' works. This item involved the question whether the cost of distribution, or any part of it, was properly chargeable as part of the actual cost of generating light.

The trial judge upheld the respondents' contention on all three

points which arose under s. 20, sub-s. 11, of the agreement, set out in their Lordships' judgment. He held that the expression in that clause, "actual cost of generating the light," meant prime cost of production and cost of distribution; that the parties contemplated in the said agreement the cost of production and distribution of electricity; that the term "actual cost" most nearly approximated "prime cost," and included depreciation and repairs and maintenance, and such proportion as could be fairly allocated to the electric undertaking of management charges, rent, rates, and taxes.

The Supreme Court declared in appeal that the appellants were entitled to be supplied with quarterly accounts shewing the actual cost of generating the light, and directed that of the expenditure incurred on joint account of electric and water supply so much should be allocated to the supply of electricity as should be found by the referee from the books and accounts to represent the due proportion expended for the purpose of generating the light, and that wherever the information could not be obtained from the books and accounts he should allocate half the cost to each undertaking. That for the rest the judgment in the Court below should stand, and that each party should pay its own costs; and by postea, dated December 17, 1906, it was declared that the Court further found that the expression 'actual cost of generating the light' meant the actual expenditure incurred for the purpose of production and distribution and included depreciation and insurance.

The Supreme Court also held (inter alia) that the cost of the plant formed part of the actual cost of generating the light, and that the effect of allowing a sum for depreciation was simply to distribute the actual cost of the plant over the whole period during which it would in the ordinary course be of any service in the generation of electricity and light.

Sir R. B. Finlay, K.C., and *J. W. Gordon*, for the appellants, contended that under the true construction of s. 20, sub-s. 11, the expression "actual cost of generating the light" could not in any case include the charge of depreciation and insurance. Further, it does not include so much of the cost incidental to the

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distribution and consumption of the current as does not affect the cost of generating it. Depreciation is not an item of actual expenditure. Besides, repairs and maintenance are charged for, and a charge for depreciation is a second charge for the same thing. Depreciation is not increased, but minimized, by constant use of the machinery and plant. It is well known that unemployed machinery depreciates more rapidly than the same machinery when fully employed: see *Commissioners of Public Works* v. *Hills*. (1) Insurance, too, is a cost incidental to mere possession, and is not part of the cost actually incurred in generating light. Then, too, with respect to the cost of distribution, cost other than such as arises from leakage from the mains is not part of the actual cost of generating the light. Leakage is a heavy item of expenditure. It has to be made good by generating current in excess of that which is actually used in the lamps, and may be included in the cost of generating the light. But it was contended that the full actual cost of working the generating plant (including the cost of leakage), and an additional payment of 10 per cent. by way of gross profit, was intended to cover all costs of distribution over and above leakage and any other remuneration properly payable by the appellants in connection with the care of the public lighting.

Cohen, *K.C.*, and *H. O'Hagan*, for the respondents, contended that the expression "generating the light" in the said sub-section meant production of electricity and also distribution of electricity. The expert evidence on their behalf was to the effect that the cost of generating light included the cost not only of generating the current, but also the cost of distributing the current when generated, and in fact all costs up to the point of ignition in the lamp. The forms of account prescribed by the Board of Trade for use in England by electric lighting companies included in revenue account the items management, rates, taxes, and depreciation, although they did not appear under the specific heading "generation of electricity." In this case the items of repairs and maintenance, so far as they relate to the actual works; management charges, so far as they relate to the salaries of those employed in actual generation and distribution

(1) [1906] A. C. 368, 374.

of electricity; rent, rates, and taxes, so far as they relate to the actual works, all form part of the actual cost contemplated by the agreement. Depreciation, being properly a charge on the revenue account, also forms part of the actual cost.

Sir R. B. Finlay, K.C., replied.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The matter in controversy on this appeal is the meaning of certain expressions contained in a memorandum of agreement dated February 28, 1895, and made between the British South Africa Company, called "the company," of the one part, and three gentlemen, who are called "the contractors," of the other part.

By this agreement the company granted to the contractors the right to supply the inhabitants of the town of Bulawayo and its suburbs with electric light and power. In consideration of that concession the contractors agreed to establish an electric light central station in Bulawayo and to supply light to the inhabitants on certain terms and conditions contained in the contract. They also agreed (s. 20), in case the company should desire to avail themselves of the electric light in their streets, public places, or private property, to light such streets, public places, and private property. The agreement then proceeded to specify, in a series of sub-sections, with more or less detail the things which the contractors would have to do in order to carry out their undertaking, and by sub-s. 10 the contractors undertook to provide everything, whether mentioned in the contract or not, which might be necessary for the purpose of supplying the electric light to the street lamps. Then comes sub-s. 11, which is in the following terms: "(11.) In consideration whereof the said company undertakes and agrees to pay to the said contractors or to their assigns at such rate as will yield to the contractors a return equal to 10 per cent. over the actual cost of generating the light, payments to be made quarterly at the office of the company in Bulawayo."

For the purposes of this agreement the British South Africa Company is now represented by the municipality of Bulawayo.

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The Bulawayo Waterworks Company, Limited, are the assigns of the original contractors.

The agreement contemplated that the public lighting of Bulawayo would, or at any rate might, be carried out by means of a separate station and separate works. But when the contractors were called upon to light the streets (as they were shortly after the date of the agreement), it was found more convenient to supply light for public and private purposes from one and the same centre.

At first the municipality was content to pay the contractors so much per unit for lighting the streets in Bulawayo. After a time, however, disputes arose, and the contractors were required to supply light in accordance with the terms of sub-s. 11. Then various questions sprang up, most of which were finally decided by the High Court of Southern Rhodesia in the present action, in which the contractors were plaintiffs. Neither party, however, was altogether satisfied with the decision of that Court, and there was an appeal, with a cross-appeal to the Supreme Court of the Colony of the Cape of Good Hope. The Supreme Court dismissed both the appeal and the cross-appeal. Their decree, after dealing with certain points which are not now in dispute, proceeds to declare that "the Court finds that the expression 'actual cost of generating the light' means the actual expenditure incurred for the purpose of production and distribution and includes depreciation and insurance."

The discussion before this Board was confined to the declaration made by the Supreme Court.

What is the meaning of the expression "generating the light"? And what is included in the "actual cost" of generating the light?

Their Lordships agree with the Chief Justice in thinking that "the term 'generating the light' was intended to include not only the generation of the current, but also the transmission of the current to the points where the light is finally evolved." The language is certainly not altogether accurate, but their Lordships are satisfied that this compendious expression was intended to cover the whole process—the whole series of operations—leading up to the production of the light in the street lamps.

The next question is, What is the meaning of the "actual cost" of generating the light? In their Lordships' opinion it covers and includes all that the production of the light costs the contractors, and nothing more. Does it include depreciation and insurance? As the Chief Justice says, "The cost of the plant forms part of the actual cost of generating the light, but, as the use of that plant would extend over several years, it could obviously not have been intended that the whole of that cost shall be charged during the first quarter [of the contract]. But the same objection does not exist to a distribution of the actual cost of the plant over the whole period of the life of such plant. The effect of allowing a certain sum for depreciation in the quarterly accounts of the plaintiffs would simply be to distribute the actual cost of the plant over the whole period during which it would, in the ordinary course, be of any service in the generation of electricity and light."

Their Lordships have felt more difficulty about including insurance. In the Court of first instance it was held, apparently without serious objection, that the item "rent, rates and taxes" in respect of the electric works and buildings ought to be allowed, and the Chief Justice states that it was assumed in the Court of Appeal on both sides that, in allowing that item, the Court below intended to include the charge for insurance also. In running works of this sort insurance is practically a necessity, and so expenditure on insurance may fairly be regarded as part of the actual cost just as much as rent, rates and taxes. On the whole their Lordships see no reason to disturb the finding of the Court of Appeal.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed.

The appellants will pay the costs of the appeal.

Solicitors for appellants: *Slaughter & May.*
Solicitors for respondents: *Ashurst, Morris, Crisp & Co.*

[PRIVY COUNCIL.]

J. C.* 1908 *March* 18.

TSHINGUMUZI AND ANOTHER . . . . . APPELLANTS;

AND

ATTORNEY-GENERAL OF THE COLONY OF NATAL . . . . . RESPONDENT.

ON APPEAL FROM THE NATIVE HIGH COURT OF THE COLONY OF NATAL.

Practice—Special Leave to appeal in a Criminal Case.

Special leave to appeal in a criminal case was refused in a case of disputed evidence, on which the judges had differed.

In re Dillet, (1887) 12 App. Cas. 459, followed.

THIS was a petition for special leave to appeal from a judgment of the Native High Court of the Colony of Natal (December 13, 1907) convicting the petitioners of sedition.

It stated that the two petitioners and one Mbombo, since deceased, were indicted in December, 1907, for sedition and public violence at or near the division of Lower Tugela in February and July, 1906. The three counts of the indictment were: (1.) That they wrongfully, unlawfully, and seditiously took up arms, assegais, and other offensive weapons for the purpose of defying and resisting the lawful authority of the King and his officers and did so defy them; (2.) that they wrongfully, unlawfully, and seditiously encouraged, incited, ordered, forced, and compelled by violence, force, threats, and by evil example and secret machinations and contrivances the native population of the district and Colony to take up arms and rise in rebellion against the King, and caused a large assembly of natives to collect together armed, and, so armed, to go about the district in open defiance of the Government and laws of the Colony; and (3.) that they wrongfully, unlawfully, seditiously, and riotously with others assembled and gathered together, being armed with firearms and assegais and other weapons, to disturb the public peace, and did doctor themselves and others and go through various ceremonies

* *Present:* LORD LOREBURN L.C., LORD MACNAGHTEN, LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

at or near the Nkanini Kraal preparatory to and with the intention of resisting and defying the lawful authority of the King, and thus went about the district, violently and forcibly defying public order and tranquillity and the authority of the King.

The petition further stated that the Court unanimously acquitted all three on the first two counts, but by a majority (the President of the Court dissenting) convicted them on the third count, the petitioners being sentenced to a fine of 100*l.* or to undergo eighteen months' imprisonment with hard labour.

It then submitted that the indictment was bad in law as charging two different offences and ought to have been quashed; and that the overt act charged in the third count did not disclose in law or support the offence charged, that the trial violated principles of natural justice, and that grave injustice had been done. The matters alleged in the third count did not amount to sedition within the meaning of Roman-Dutch law, which by Act 39 of 1896 had been declared to be the law of the Colony as accepted by the legal tribunals of the Cape Colony up to August 27, 1845, and as modified by the ordinances, laws, and Acts then in force and thereafter made by the Governor or Legislature of Natal. It alleged that there was no evidence to prove the overt acts charged in the third count, but that evidence had been improperly admitted of overt acts not charged in the indictment; and that after the prosecution had closed its evidence the Court materially amended the indictment so as to allege an offence committed between February and July instead of in those specific months.

Jellicoe and *H. E. Drummond Lloyd*, for the petitioners, contended that the Native High Court had no jurisdiction. The Supreme Court Act of 1896, which extended the law of Natal to Zululand, had never been promulgated and therefore never came into force. There was no evidence that any of the statutes extending the Roman-Dutch law to Zululand or conferring jurisdiction on the Native High Court had ever been promulgated, and no evidence was given as to Roman-Dutch law which had been introduced from another Colony. The judges differed

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as to the effect of the evidence, and the President was in favour of acquittal. It was desired, therefore, to have the whole evidence reviewed in appeal.

Sir R. Finlay, K.C., and *Hansell*, for the respondents, were not heard.

The judgment of their Lordships was delivered by

LORD LOREBURN L.C. The rule applicable to cases of this kind was laid down in the case of *In re Dillet* (1) in the year 1887 as follows: "Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shewn that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done." Their Lordships do not think that anything has been done to bring the present application within that rule. It is impracticable to suppose that in such a case as this of disputed evidence, or where the question is as to the proper inference to be drawn from the evidence, this Board can judge better than those who have heard the witnesses themselves. The fact that there was a difference of opinion amongst the judges is not a ground on which, by itself, their Lordships could act in a case like the present. Accordingly their Lordships are unable to advise His Majesty that special leave should be granted.

There will be no order as to costs.

Solicitors for petitioners: *Metcalfe & Sharpe.*

Solicitors for respondents: *Sutton, Ommanney & Rendall.*

(1) 12 App. Cas. 459, at p. 467.

[PRIVY COUNCIL.]

CHINA NAVIGATION COMPANY, LIMITED (Owners of SS. Chinkiang) . . . . . } Defendants;

AND

COMMISSIONERS FOR EXECUTING THE OFFICE OF LORD HIGH ADMIRAL OF THE UNITED KINGDOM . . . . . } Plaintiffs.

CHINA NAVIGATION COMPANY, LIMITED (Owners of SS. Chinkiang) . . . . . } Plaintiffs;

AND

COMMANDER LEATHAM . . . . . Defendant.

J. C.* 1908 *Feb.* 19; *March* 18.

ON APPEAL FROM HIS BRITANNIC MAJESTY'S SUPREME COURT FOR CHINA AND COREA.

Art. 16 *of Regulations under Merchant Shipping Act*, 1894—*Collision in dense Fog—Negligence in not going with moderate Speed—Failure to stop and ascertain Position of the Vessels.*

Art. 16 of the King's Regulations, which is in the same terms as art. 16 of the Regulations under the Merchant Shipping Act, 1894, ought to be most carefully adhered to in order to avert the danger of collision in thick weather.

Where a collision took place in a dense fog off the Shantung Promontory, North China, and the judge held that the appellants' vessel was solely to blame for not stopping and going at a speed of 9½ knots an hour in the fog which prevailed:—

Held, in appeal, that the respondents' vessel must be pronounced in part to blame, and that her commander should be held guilty of negligence contributing to the collision in that he was going at a speed of about 6·8 knots an hour, which, having regard to the weather and the circumstances of the case, was not a moderate speed within the meaning of the article, and that by not stopping her engines after hearing the first signals by the appellants' vessel, until he could ascertain her position with certainty and what she was doing, he failed to comply with its directions.

Consolidated appeals from a judgment of the above Court (August 15, 1906) which, under the circumstances detailed in

* *Present:* Lord Macnaghten, Lord Atkinson, Sir Arthur Wilson, and Sir Gorell Barnes. *Nautical Assessors:* Admiral Rodney M. Lloyd, C.B., and Commander W. F. Caborne, C.B., R.N.R.

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their Lordships' judgment, held that the *Chinkiang* was alone to blame and absolved the *Alacrity* from blame for the collision which occurred between them.

In this appeal it was admitted that the *Chinkiang* was partly to blame, but it was contended that the judgment ought to be varied and that the *Alacrity* and its commander, Leatham, ought also to be held guilty of negligence contributing to the collision.

Butler Aspinall, K.C., and *A. D. Bateson*, for the appellants, contended that the evidence shewed that the *Chinkiang* was sounding her whistle according to the King's Regulations and keeping a good look-out. When the *Alacrity* came in sight about a length off and about four points on the starboard bow it was coming fast. The *Chinkiang* put her engines full speed ahead and helm hard-a-starboard, two short blasts being given on the whistle. The commander of the *Alacrity* admitted that he was navigating and continued to navigate at a speed of 6·8 knots an hour after he had heard, forward of his beam, the *Chinkiang's* whistle, and without ascertaining the *Chinkiang's* position. He neglected to slacken speed and did not stop her engines after having heard the whistle five or six times. When he did stop them he did not reverse them so as to take as much way off the ship as possible. Reference was made to *The Campania* (1); *The Aras.* (2)

Sir W. S. Robson, A.-G., and *W. Wills*, for the respondents, contended that there was no negligence on the part of the *Alacrity* in not stopping sooner than she did. The positions of the vessels, it was contended, were sufficiently ascertained within the meaning of art. 16 of the regulations. After the first fog signals were heard an interval of from five to ten minutes elapsed without any signal whatever before the first loud blast of the *Chinkiang*, and that justified the *Alacrity* in proceeding at a speed which, it was contended, was moderate having regard to the circumstances and conditions which gave rise to the impression that the two vessels were going the same way. It did

(1) [1901] P. 289; S. C. 9 Asp. 177. (2) [1907] P. 28.

not amount to negligence when the *Alacrity* omitted to reverse her engines at the time she stopped them.

Counsel for the appellants were not heard in reply.

The judgment of their Lordships was delivered by

Sir Gorell Barnes. These are two consolidated appeals from the judgment of His Britannic Majesty's Supreme Court for China and Corea at Shanghai. The appellants are the owners of the ss. *Chinkiang*, and the respondents in the first appeal are the Commissioners for Executing the Office of Lord High Admiral of the United Kingdom, and the respondent in the second appeal is Commander Leatham, the commander of His Majesty's despatch vessel *Alacrity*. The first action was brought by the Commissioners against the China Navigation Company, Limited, owners of the ss. *Chinkiang* (the appellants), and the second action was brought by the appellants against Commander Leatham. The respective plaintiffs in each action sought to recover damages sustained in a collision between the *Alacrity* and the ss. *Chinkiang*, which occurred in the neighbourhood of Shantung Promontory, North China, on July 6, 1906. The actions were tried together and on the same evidence, and the present appeals were consolidated by leave. The actions were heard on August 8, 9, and 11, 1906, before F. S. A. Bourne, Esq., Acting Judge of His Majesty's Supreme Court for China and Corea, assisted by one assessor, and on August 15, 1906, the learned judge found the *Chinkiang* solely to blame for the collision, and gave judgment in favour of the plaintiffs in the first action with costs, and in the second action for Commander Leatham with costs. From these judgments the appellants appeal, and, while admitting that the *Chinkiang* was partly to blame, contend that the judgments ought to be varied, and that the *Alacrity* should be pronounced in part to blame for the collision, and that Commander Leatham should also be held guilty of negligence contributing to the collision.

At the time of the collision the *Chinkiang*, a screw steamship of 1985 tons gross register, fitted with engines of 250 h.p. nominal, was proceeding on a voyage from Chefoo to Swatow, laden with a general cargo, and the *Alacrity*, a twin-screw

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despatch vessel of 1700 tons register, and fitted with engines of 1700 i.h.p., was proceeding from Shanghai to Wei-Hai-Wei. The collision took place a few minutes after 11 A.M. on the morning of July 6, 1906, in a dense fog off the Shantung Promontory, North China. The fog was so dense at the time that the vessels could only be seen from each other a very short distance, some of the witnesses say at about a cable's distance, though there is evidence that they could only be seen about a ship's length off. The *Chinkiang*, shortly before the collision, appears to have been proceeding on a course of S. 78° E. true, and at about 10.50 those on board of her heard a faint sound on the starboard side several times, which the master of the *Chinkiang* stated that he thought at first was the siren on the promontory lighthouse. At 11 o'clock the *Chinkiang* appears to have run into a dense fog, having previously had intermittent foggy weather, and thereupon the vessel was slowed and the whistle, which had been previously sounding, was sounded more frequently, and shortly afterwards the *Alacrity* was sighted on the starboard side about a ship's length off. Thereupon the helm was put hard-a-starboard and the engines ordered full speed ahead, and two short blasts of the whistle sounded, but the collision happened, the bowsprit of the *Alacrity* first striking the *Chinkiang* on the starboard side in the fore-rigging. The learned judge found that those on board the *Chinkiang* ought not to have mistaken the *Alacrity's* sound for the lighthouse signal; that upon hearing the *Alacrity* signal the engines of the *Chinkiang* should have been stopped; and that before entering the fog bank at 11 o'clock the *Chinkiang* was steaming at about nine and a half knots an hour, and he held that the *Chinkiang* was clearly to blame for not stopping, and for going at a speed which was not moderate in the fog which prevailed.

The case presented on the part of the respondents was that the *Alacrity* was going up the coast to make the Shantung Promontory, which she had to clear before turning on a westerly course in order to reach Wei-Hai-Wei; that, having reached the neighbourhood of Shantung about 10 A.M., she steered in for the land at 10.9 A.M. on a west course until 10.45 A.M., at which time her course was altered to N. 20° W., and at 10.50 the engines,

which from 10.30 or thereabouts had been working at dead slow, were increased in speed to fifty revolutions per minute, giving the vessel, according to the evidence of Commander Leatham, who was on the deck in command during the material time, a speed of 6·8 knots per hour, though according to the engineer's log-book her speed would seem to have been from that time about 7·2 knots per hour. The *Alacrity* proceeded thus, sounding her siren, and about ten minutes before 11 a siren or whistle was heard on the port bow, and was, according to the evidence, heard constantly until it ceased, dying away on the quarter of the *Alacrity*.

Commander Leatham, in his evidence so far as material, further proceeds to say as follows: "I heard a second steamer fog signal also on port bow—not loud—some distance off; I should have judged it to be two or three miles off; certainly not close. I heard it perhaps five or six times. I did not think it was approaching. I judged it to be a steamship going same way we were. I heard no other till *Chinkiang's* whistle was close upon us. The whistle, which proved to be the *Chinkiang*, suddenly sounded close to out of fog a little more than a minute before the collision. I know it was very close. I did not associate that loud whistle with the whistle I had heard before on port bow. There had been a long interval. I did not at that moment see the vessel that blew that loud blast. Immediately I heard that whistle I stopped engines. . . . . That order to stop was carried out at once. About half a minute after hearing whistle I saw bow wave of *Chinkiang*. Loud whistle came as a surprise to me. I saw bow wave on my port bow. About five points from right ahead—immediately after seeing bow wave—I saw the steamer. As I saw she was going at a high rate of speed and crossing my bow, I went full speed astern with both engines. I was then going very slow, as I had previously stopped, and had very little way on . . . . at the time of collision very little way, say two knots, reducing all the time, because full speed astern. When I first saw *Chinkiang* I judged she was going fast. I first saw her about a cable off. . . . . There was nothing to lead me to believe that I ought to stop engines before I did until I heard the loud whistle I referred to before."

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Navigating Lieutenant Harman's evidence, as far as it is necessary to refer to it, was as follows: "About ten minutes to 11 we heard siren on port bow. The siren got louder, and passed us on port side between ourselves and promontory. About three minutes to 11 I heard another siren, very faint, on port bow. I heard it about five times at intervals of about a minute, and the sound did not get any louder. There was nearly an interval of about five or six minutes, when I could hear siren faintly on the port bow; 11.9 I suddenly heard a siren very close to us on port side, and very loud. . . . . Before we heard that loud siren we had no indication that a steamship was close to us. I did not associate any of sounds I heard on port bow with the loud whistle. . . . . The whistle on port bow very faint, and about same, as if going the same way. We heard that whistle five or six times inclusive. Period from first to last whistle about five minutes. Period not more than seven minutes. During that five to seven minutes we proceeded at least five to six knots. Sound did not increase in volume. I thought she had got out of signal distance."

This evidence sufficiently indicates the case made on behalf of the *Alacrity*, which was to the effect that she was going at a moderate rate of speed before hearing any sound from the *Chinkiang*, and that, in the circumstances detailed in the evidence of Commander Leatham, he was not to blame for not having ordered the engines to be stopped on hearing the first signals from the *Chinkiang*.

The learned judge on the first point, and acting upon the advice of his assessor, held that the speed of the *Alacrity* was not excessive. On the second point the learned judge expresses himself thus: "But I have put Commander Leatham's and Lieutenant Harman's evidence on this point to the assessor, and he thinks it quite likely, considering the distance between the two ships, and the fog, that these five whistles might have produced on the minds of capable and careful navigators the impression that the *Chinkiang* was going the same way as the *Alacrity*. I think then, although not without some doubt, looking to the imperative terms of the second clause of art. 16, that I ought not to find the *Alacrity* to blame on this score, especially since

this particular point was not much illustrated in evidence or argument."

Their Lordships are unable to agree with the learned judge upon either of the points aforesaid, upon which he found in favour of the *Alacrity*. Art. 16 of the King's Regulations, which is in terms the same as art. 16 of the Regulations under the Merchant Shipping Act, 1894, is as follows:—

"Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

Their Lordships do not consider it necessary to review the cases which were quoted in argument before them in connection with the question of moderate speed. They are clearly of opinion that, having regard to the weather and the circumstances of this case, the *Alacrity* was not proceeding at a moderate speed, and that her excessive speed was a contributing cause to the collision in question. It is remarkable to notice that when the *Alacrity* was being headed in towards the land to make her position her speed was reduced to dead slow, and there seems to have been no reason whatever why that speed should not have been maintained afterwards when she was set on her course, having regard to the state of the weather which then prevailed.

Art. 16 is a most important article, and one which ought to be most carefully adhered to in order to avert the danger of collision in thick weather, and although the *Alacrity* possessed considerable power of control and manœuvring, having regard to her high engine power, and making allowance for any consideration which should be given to the capability of such a vessel to reduce her speed with great promptitude, their Lordships cannot consider that the speed which was upon the vessel in this case was such as to comply with the terms of art. 16.

With regard to the second point, counsel for the respondents on the appeals raised a point which does not seem to have been

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made in the Court below, namely, that the signals which were heard on board the *Alacrity* after those of the vessel which passed down the port side of the *Alacrity* were not signals from the *Chinkiang*, and they suggested that they were probably the signals of another vessel, the *Wuhu*, which had left Chefoo with the *Chinkiang* and passed her. It seems, however, to have been assumed in the Court below that the second set of signals which were heard from the *Alacrity* were signals made by the *Chinkiang*. This was certainly taken to be the case by the learned judge and his assessor. There was no evidence that any other vessel was in the neighbourhood, except the *Wuhu*, and that, it seems reasonably clear, was the vessel which had passed down the port side of the *Alacrity*. The new point seems to have been now made on the appeal in the hope of getting rid of the difficulty which must necessarily be felt with regard to the fact that the engines of the *Alacrity* were not stopped when the signals made by the *Chinkiang* were first in fact heard. The case really made below was that, from the sound of those signals, those on board the *Alacrity* were entitled to assume that the *Chinkiang* was going the same way as the *Alacrity*, which it was suggested might be assumed from the fact that, although the whistles were first heard several times, there was an apparent cessation of their sound for what Commander Leatham described as a long interval.

From Lieutenant Harman's evidence, as worded in the printed record and quoted above, it seems doubtful whether that wording indicates that he also spoke to an interval after the first sounds of the whistle were heard, though the learned judge took him to have intended to convey that there was an interval of five or six minutes, and it may be that this is the correct reading of his evidence. But, even assuming that to be so, and that his evidence is in complete accord with that of Commander Leatham, the finding of the learned judge is not that those on board the *Alacrity* were justified in assuming that the *Chinkiang* was going the same way as the *Alacrity*; it merely conveys the view of the assessor that he thought it quite likely, considering the distance between the two ships, and the fog, that the five whistles might have produced that impression on the minds of capable and careful navigators.

Their Lordships are of opinion that in not stopping the engines of the *Alacrity* after hearing the first whistle of the *Chinkiang* Commander Leatham committed a breach of the second paragraph of art. 16 in the circumstances detailed by himself in his evidence. It is notorious that it is a matter of the very greatest difficulty to make out the direction and distance of a whistle heard in a fog, and that it is almost impossible to rely with certainty on being able to determine the precise bearing and distance of a fog signal when it is heard, and it is clear that in the present case the indications given by the *Chinkiang* to the *Alacrity* were not such as to shew to those on board the *Alacrity* unequivocally and distinctly what was the position of the *Chinkiang*, and that the commander of the *Alacrity* was not justified, from what he heard, in assuming that the *Chinkiang* was going the same way as the *Alacrity*. The engines of the *Alacrity* ought to have been stopped until it could be, with certainty, ascertained what the position of the *Chinkiang* was, and what she was doing.

Both in respect of the excessive speed and for not stopping the engines when the fog signal of the *Chinkiang* was first heard the *Alacrity* must be held to blame, and Commander Leatham to have been guilty of negligence, and their Lordships are clearly of opinion that that negligence contributed to the collision.

Their Lordships desire to state that the advice which they have received from the assessors who have assisted them upon the appeals is entirely in accordance with the conclusions at which their Lordships have arrived.

Their Lordships will, therefore, humbly advise His Majesty that the orders of the Court below should be discharged, and that, in the first action, both vessels should be pronounced to have been in fault, and that a moiety only of the damage proceeded for by the plaintiffs therein ought to be borne by the owners of the ss. *Chinkiang*, and that they be condemned in a moiety of the plaintiffs' claim in respect of the said damage, with a reference to the registrar of the said Court, assisted by merchants, to assess the same; and that, in the second action, it should be pronounced that the collision was occasioned by the fault or default of the owners, master, and crew of the *Chinkiang*,

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or some or one of them, and by the fault or default of Commander Leatham, and that a moiety only of the damage proceeded for by the plaintiffs therein ought to be borne by the said Commander Leatham, and that he be condemned in a moiety of the plaintiffs' claim in respect of such damage, with a reference to the registrar of the said Court, assisted by merchants, to assess the same; and that the costs in the Court below of the said actions be borne by the respective parties who incurred the same. The respondents must pay the costs of the appeals.

Solicitors for appellants: *Waltons, Johnson, Bubb & Whatton.*
Solicitor for respondents: *Treasury Solicitor.*

[PRIVY COUNCIL.]

J. C.* 1908 *March* 12, 13.

TORONTO RAILWAY COMPANY . . . . . DEFENDANT

AND

KING AND ANOTHER . . . . . PLAINTIFFS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Verdict of Jury upheld—Evidence properly submitted—Order granting New Trial set aside—Practice—Special Leave to cross appeal nunc pro tunc.

In an action for damages against the appellants for loss of life occasioned by the negligent management of their tramcar by their servant employed to drive it, the jury found that the servant was guilty of negligence in causing the accident and that the deceased was not guilty of contributory negligence, and judgment was accordingly entered for the plaintiffs:—

Held, that the Court in appeal from that judgment was in error in setting it aside and ordering a new trial, there having been evidence on both issues properly submitted to the jury. It is not valid ground for ordering a new trial that the judges differ from the conclusion at which the jury have arrived or consider that the findings shew that the defendants had not had a fair and unprejudiced trial. Special leave to the respondents to cross appeal against the order for a new trial granted nunc pro tunc; the appeal praying that the action should be dismissed.

APPEAL by special leave from a decree of the Court above mentioned (November 3, 1906) ordering a new trial of an action

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in which Meredith C.J. (February 18, 1906) had ordered judgment to be entered for the respondents on the findings of the jury.

At the trial the appellants, under the circumstances stated by their Lordships, claimed a judgment of non-suit at the close of the respondents' case. The trial judge declined to hear argument on that point at the time, directed the case to go to the jury, and, after the jury had brought in their findings, delivered judgment refusing the appellants' motion for a non-suit upon the ground that there was "some slight evidence of negligence" which, according to the authorities in the Ontario Courts, made it impossible for him to withdraw the case from the jury, although he arrived at that conclusion "with considerable doubt"; he therefore directed judgment to be entered in favour of the respondents for the amount found due to them by the jury.

In appeal the judges were divided in opinion. Three (Moss C.J.O., Meredith and Maclaren JJ.A.) decided in favour of a new trial; two (Osler and Garrow JJ.A.) considered that the case should have been withdrawn from the jury and the action dismissed.

Meredith J.A. delivered the judgment of the majority. He considered that the plaintiffs were embarrassed by the jury having said too much in their favour, indicating favour towards them or prejudice against the defendants, or possibly both. He then stated "that no reasonable and unprejudiced man could say that the deceased acted with ordinary care, or that the accident would have happened had he taken such care," and further on he found that "there was no reasonable evidence to support the finding of the jury to the effect that the deceased was not guilty of any negligence."

Osler J.A. said: "I see no reasonable evidence of negligence on the part of the motorman. There is not, to my apprehension, the least evidence that he had any reason to suppose when he slightly accelerated the speed of the car, in the ordinary course of its management, that the deceased van driver intended or would attempt to cross the street in front of the car or would not slow up his vehicle as he came to the track, as he ought to have done, and as hundreds of drivers do every day"; and again he

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says: "Assuming that there was some evidence of negligence on the motorman's part by putting on power south of Adelaide Street, that would not entitle the plaintiffs to recover," for "both parties may be said then to have been in simultaneous and negligent motion when the collision occurred, and neither is in a position to complain of the consequences. This case, in my opinion, is one of reckless driving on the part of the unfortunate deceased, continued to the moment when it was too late to avoid the catastrophe, and the result ought to be a judgment for the defendants."

Garrow J.A. put it as follows: "The deceased, familiar with the locality in broad daylight, drove his horse and waggon, without pause, across a railway track, in front of an approaching car, which he could have seen and must have seen, and was, in consequence, struck and killed. What else was to have been expected? It was the obvious and not the extraordinary which happened. It may be that the motorman saw him approaching the track—he says he did—but was he bound to assume that the deceased intended to cross? I think not. There was not, in my opinion, a particle of evidence reasonably proper for a jury."

The appellants claimed that the action should have been dismissed, and the respondents gave them notice that they would support the verdict and judgment at the trial and would file, if necessary, a formal petition for leave to cross appeal against the order for a new trial.

Sir R. Finlay, K.C., and *D. L. McCarthy*, for the appellants, contended that judgment should have been entered for the defendants. There was no evidence of negligence which should properly have been submitted to the jury on the part of the appellants' motorman. There was no evidence that the motorman did not do everything which he reasonably could to avoid the collision when once the danger thereof had become imminent. Further, it was shewn upon the evidence and the admissions of the plaintiffs' counsel that the deceased driver of the waggon was negligent inasmuch as he could have seen the approaching car had he looked. He took no steps to avoid the accident,

although he had ample opportunity to stop or to turn to either hand. If both parties were negligent, the case should have been withdrawn from the jury and the action dismissed. There was no evidence of reasonable care having been exercised by the deceased which was fit to be submitted to the jury. Reference was made to *Metropolitan Ry. Co.* v. *Jackson* (1); *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* (2); *Railroad Co.* v. *Houston* (3); *Elliot* v. *Chicago, Milwaukee, &c., Ry. Co.* (4); *Morrow* v. *Canadian Pacific Ry. Co.* (5); *Allen* v. *North Metropolitan Tramways Co.* (6)

F. E. Smith, K.C., and *A. J. Russell Snow, K.C.*, for the respondents, contended that the findings of the jury after the evidence had been fairly submitted to them by the trial judge were conclusive. There was evidence of negligence by the motorman, and evidence that there was no contributory negligence by the deceased; therefore there could not have been judgment of non-suit, and the case could not have been withdrawn from the jury. The evidence of the motorman's negligence was that he slowed down as he approached the intersection of two streets (Yonge and Adelaide) which is a regular stopping place for cars which, like his own, were going north. He thereby invited the deceased to cross the lines, when, without looking out or giving any warning, he suddenly increased his speed and came into collision with the rear wheels of the deceased's waggon. That was evidence on which the jury's finding could be reasonably made, and should therefore be allowed to stand; for he thereby infringed rule 58 of the company's published rules. This negligence was the proximate cause of the collision. It was submitted that the judgment at the trial should be restored, and, if necessary, special leave to cross appeal should be given nunc pro tunc for that purpose. Reference was made to *Connecticut Mutual Life Insurance Co.* v. *Moore* (7); *McArthur* v. *Dominion Cartridge Co.* (8)

Sir R. Finlay, K.C., replied.

(1) (1877) 3 App. Cas. 193.
(2) (1878) 3 App. Cas. 1155.
(3) (1877) 95 U. S. 697.
(4) (1893) 150 U. S. 245.
(5) (1894) 21 Ont. A. R. 149.
(6) (1888) 4 Times L. R. 561.
(7) (1881) 6 App. Cas. 644.
(8) [1905] A. C. 72.

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The judgment of their Lordships was delivered by

LORD ATKINSON. The action out of which this appeal arises was brought by the respondents, the representatives of one David King, deceased, who lost his life in a collision between a delivery van, which he was driving, and an electric tramcar belonging to the defendants (the appellant company), brought about (as it is alleged) by the negligent management of the tramcar by the servant of the company employed to drive it.

The street in Toronto in which the tramway line in question lies is named Yonge Street. It runs north and south, and is intersected at right angles by a street, called Adelaide Street, running east and west. The collision took place "between lights," as it is said, early on the morning of December 21, 1904. Yonge Street, as it approaches the intersection of the streets, has an upward gradient to the north of $1\frac{1}{4}$ in 100. Immediately before the collision the tramcar, having passed the line of the houses in Adelaide Street on its southern side, proceeded northward along Yonge Street on the right-hand line of rails. The deceased was coming along Adelaide Street from the west at, it is alleged, from six to eight miles an hour. It is obvious that he sought to cross in front of the tramcar. He nearly succeeded, for it was the afterpart of his vehicle which was struck. A second more would have saved him. The two vehicles, however, came into collision at a spot nearly midway between the lines of the buildings on the northern and southern sides of Adelaide Street, and the waggon was struck with such force that it was pushed along sideways for a distance of over twenty to thirty feet, with the result that the deceased was thrown out upon the road and killed.

There is no substantial conflict of evidence in the case. The important facts are, in the main, not disputed.

At the close of the plaintiffs' case the defendants asked for a non-suit on two grounds—(1.) on the ground that there was no evidence to go to the jury that the driver of the tramcar had been guilty of any negligence in the driving or management of his car, and (2.) on the ground that during the progress of the plaintiffs' case facts were proved, by the evidence of their own witnesses, which clearly established that it was the negligence

of the deceased which caused the accident, and that the defendants were therefore entitled to a direction according to the principle established by the cases of *Metropolitan Ry. Co.* v. *Jackson* (1) and *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* (2), or, in other words, that, though there might be evidence to go to the jury that the driver had negligently driven and managed the tramcar, it was clear from the plaintiffs' own evidence that it was not the negligence of which the driver was guilty which caused the accident, but the folly and recklessness of the deceased himself. The learned judge at the trial, Meredith C.J., refused to non-suit the plaintiffs, and at the close of the defendants' case left to the jury seven questions which, with the answers given to them, were as follows:—

Q. 1. "Was the injury to the deceased caused by the negligence of—

"(1.) The motorman alone?"—A. "Yes."

"(2.) The deceased alone?"—A. "No."

Or

Q. 2. "Was it due to the negligence of both of them?"—A. "No."

Q. 3 "In what did any negligence which you find consist?"—A. "We find the motorman negligent, after slowing up at Adelaide Street, in again putting on power at this point without observing the approach of the deceased's waggon."

Q. 4. "Could the motorman, after the danger of collision being imminent became apparent to him, have avoided the accident by the exercise of reasonable care on his part?"—A. "Yes."

Q. 5. "Ought the motorman, if he had exercised reasonable care, to have apprehended sooner than he did that a collision was imminent?"—A. "Yes."

Q. 6. "If you answer 'yes' to question 5, could the motorman, when, in your opinion, he should have apprehended that a collision was imminent, have avoided the accident by the exercise of reasonable care on his part?"—A. "Yes."

Q. 7. "Damages?"—A. "The widow $3000; the daughter $1500."

(1) 3 App. Cas. 193. (2) 3 App. Cas. 1155.

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Upon these findings, Meredith C.J., after consideration, and apparently with some doubt, entered judgment for the plaintiffs for the two sums of $3000 and $1500 respectively.

From this judgment the appellant company appealed to the Court of Appeal for Ontario, contending (1.) that the plaintiffs should at the trial have been non-suited, and (2.) that the verdict entered up should be set aside on the ground (amongst others) that the damages were excessive.

Two of the judges in the Court of Appeal, namely, Osler and Garrow JJ.A., were of opinion that the verdict and judgment entered for the plaintiffs should be set aside and a verdict and judgment entered for the defendants. The effect of the judgment of the three judges who formed the majority of the Court is summed up in the following passage from the judgment of Meredith J.A.:—

"There was evidence to go to the jury on the question of negligence on the part of the driver of the car, in not seeing the deceased approaching, and the jury have found the defendants guilty of negligence in this respect.

"There being, then, negligence on both sides, the plaintiffs' action fails, unless, in the circumstances of this case, the driver of the car became aware of the man's danger, and, notwithstanding the latter's negligence, might, by the exercise of ordinary care, have avoided the accident.

"The trial judge was of opinion that there was no evidence to go to the jury upon that question, but submitted it to them, and they have very plainly found it in the plaintiffs' favour. I am not quite able to agree in that opinion, but the whole of the findings of the jury, including the assessment of the damages, satisfy me that the defendants had not a fair and unprejudiced trial, and that the judgment and verdict should be set aside, and a new trial awarded."

Owing to certain proceedings subsequently taken by the parties, the damages have by order been reduced to $3999, namely, $2750 for the widow and $1249 for the infant child, and on the hearing of this appeal no argument was addressed to their Lordships in reference to the alleged excessiveness of the damages found.

Their Lordships are of opinion, with all respect for the decision of the Court of Appeal, that no valid reason has been shewn for directing a new trial. The jury were fully and properly instructed by the learned Chief Justice. There is no preponderance of evidence in the case against which the jury have found. The facts are in the main admitted, or not disputed; the real matters in controversy are the inferences which it is proper to draw from those facts. It appears to their Lordships that the verdict and judgment must be entered either for the plaintiffs or for the defendants, and that the middle course of directing a new trial is not open.

Their Lordships think that there was evidence in the case proper to be submitted to the jury that the driver of the tramcar was guilty of negligence causing the accident, though, of course, they recognize that this is a question which may present itself differently to different minds.

Rule 58 of the defendant company's published rules is as follows:—

"Curves and Crossings.—When approaching crossings and crowded places where there is a possibility of accidents, the speed must be reduced and the car kept carefully under control.

"Go very slowly over all curves, switches, and intersections; never faster than three miles an hour, and extra caution must be used in handling double truck cars at such places.

"An intersection must never be taken when another car is approaching.

"Cross streets must not be blocked, nor must any crossing be taken until the road ahead is clear."

The driver of the tramcar, one James King, states in his evidence that when about the office of the *World*, some distance from the intersection of the two streets, he saw at least one waggon pass along Adelaide Street from west to east and cross the tram track he was about to traverse; that when he got within two or three lengths of his car from Adelaide Street he threw off the power, and allowed his car to roll on by its own momentum up the slight incline, so that he might slow coming to the crossing; that the speed of the car was

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lessening; that when he was about a car's length (about thirty feet) south of the line of the buildings in Adelaide Street, he looked along that street east and west for the first and only time, but saw nothing approaching, and seeing, as he thought, a clear space, just as he himself was in line with the south line of Adelaide Street, he put on his power gradually to proceed on his route. In his evidence there is this passage:—

Q. "Then your story is that at the south line—street line—of Adelaide, you started to put on your power, put it on gradually till you got it up to five, when you saw the rig about half a car length ahead of you?"—A. "About twenty feet; just on an angle across."

Q. "Where was the horse when you first caught sight of the ——?"—A. "Just coming on to the west rail of the west track."

Q. "Is that what you mean?"—A. "Yes."

Q. "The width of the devil strip is about three feet. Then we had it said the width of the railway line is four feet eight and a half. That would be about eight feet, then, west of the rail?"—A. "Yes."

Q. "And you were about fifteen feet, then, from that point. Did he come along just the same pace that you had seen him going?"—A. "That was the first time I had seen him."

Q. "And he was going along about that pace you are telling me of, and kept that pace up till the accident?"—A. "Yes."

Q. "Did not slow up?"—A. "No."

Q. "Did not hasten up. Just went at the same pace?"—A. "Yes."

Q. "Whereabouts did you hit the waggon?"—A. "Just in front of the hind wheel; struck the hind wheel just in front of the hub."

From the distance which the waggon was carried or pushed after it was struck, it is evident that the tramcar must have acquired considerable way before the collision. It is vital to consider what was the driver's field of vision at the time he looked up and down Adelaide Street. If the map be at all accurate, he could not possibly have seen more than 100 feet, about thirty-three yards, down that street to the west. If the deceased were driving even at the rate of six miles an hour he

would traverse this space in about ten seconds, yet the driver, without looking again, concluded the space was clear, proceeded again to put on his power, and cut across this thoroughfare. It appears to their Lordships impossible, having regard to these facts, to hold that there was not evidence to go to the jury of actionable negligence on the driver's part. Their Lordships are further of opinion that the deceased, in attempting to cross in front of the tramcar, as the driver of the latter in the above-quoted passage says he did (the man, unfortunately, cannot speak for himself), was not clearly guilty of the "folly and recklessness" causing his death which Lord Cairns, in his judgment in *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* (1), refers to as sufficient to entitle the defendants to a direction. It is suggested that the deceased must have seen, or ought to have seen, the tramcar, and had no right to assume it would have been slowed down, or that its driver would have ascertained that there was no traffic with which it might come in contact before he proceeded to apply his power and cross the thoroughfare. But why not assume these things? It was the driver's duty to do them all, and traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets. To cross in front of an approaching train, as was done by the deceased in *Slattery's Case* (1), is one thing; to cross in front of a tramcar bound to be driven under regulations such as those above quoted, at such a place as the junction of these two streets, is quite another thing.

It may well be that the driver, when he saw the deceased, did everything possible to avert the accident. Meredith, C.J., was of opinion that there was no evidence to sustain the finding that he was guilty of negligence in this respect. But it was then too late. Despite his efforts the way was not taken off the car sufficiently to prevent its striking the waggon with a force the nature of which is manifested by the result.

Their Lordships are, therefore, of the opinion that the defendants were not entitled to a non-suit; that there was evidence to

(1) 3 App. Cas. 1155, at p. 1166.

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go to the jury on the two issues—(1.) whether the driver of the tramcar was guilty of negligence causing the accident; and (2.) whether the deceased was guilty of contributory negligence. The jury have practically found these issues in favour of the plaintiffs. They are the tribunal entrusted by the law with the determination of issues of fact, and their conclusions on such matters ought not to be disturbed because they are not such as judges sitting in courts of appeal might themselves have arrived at. In their Lordships' opinion there is no ground in this case for setting aside the jury's findings. The plaintiffs, they think, are entitled to have a verdict entered for them for the reduced sum at which the damages have been fixed.

Their Lordships will humbly advise His Majesty that the judgment of the Court of Appeal of Ontario ought to be discharged with costs, and the judgment of the High Court confirmed, with the substitution of $2750 for $3000 and $1249 for $1500. The appellants will pay the costs of this appeal.

The respondents in their printed case asked that the judgment of the Court of Appeal might be set aside and the verdict of the jury restored. Some doubts having arisen whether they were competent to do so on this appeal, without having first lodged a cross petition in that behalf, their Lordships, being of opinion that the necessary relief would undoubtedly have been granted to them if they had applied for it at the time when the appellants obtained special leave to appeal, allowed the respondents at the hearing to put in such a petition nunc pro tunc, and they will humbly advise His Majesty to grant this relief.

Solicitors for appellants: *Harrison & Powell.*
Solicitors for respondents: *Blake & Redden.*

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EAST LONDON HARBOUR BOARD . . . DEFENDANTS; J. C.*

AND 1908

CALEDONIA LANDING, SHIPPING AND SALVAGE COMPANY, LIMITED . . . . PLAINTIFFS. *Feb.* 12, 13; *April* 2.

EAST LONDON HARBOUR BOARD . . . DEFENDANTS;

AND

COLONIAL FISHERIES COMPANY, LIMITED PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF THE CAPE OF GOOD HOPE.

Cape Colony Act 36 *of* 1896—*Liability of Harbour Board—Powers of Harbour Master—Negligence in removing and remooring Vessels in Port.*

The place and method of mooring vessels within a port are within the authority of the harbour-master or port captain.

Reney v. *Magistrates of Kirkcudbright*, [1892] A. C. 264, followed.

Where by a harbour-master's orders two vessels were removed from moorings and negligently remoored and retained in new positions so that on the occurrence of an extraordinary flood both were carried away and lost:—

Held, that the appellants, a harbour board constituted by Cape Colony Act 36 of 1896, were liable for the acts of their officer.

Two consolidated appeals (the latter by special leave being below the appealable amount) from a decree of the Supreme Court (September 6, 1906).

The Harbour Board of East London derives its powers from the Cape Act No. 36 of 1896. They are defined by ss. 30, 31, 36, 38, and 44, and include that of making regulations with regard to the traffic of the port, for the proper control of all vessels entering any docks, or entering within the limits of the harbour.

The board is also empowered by the said sections, and by a by-law passed thereunder, to employ for the management of the harbour under its jurisdiction and for the conduct of the business thereof such officers as may be expedient, and among

* *Present:* EARL OF HALSBURY, LORD MACNAGHTEN, LORD ATKINSON, and SIR ARTHUR WILSON.

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the duties of the harbour-master is that of pointing out to the master of any vessel arriving in port a proper berth, and of ordering, if it should appear to him necessary, any vessel to shift or change her berth to any other berth to be pointed out by him.

In the consolidated actions brought for damages for the wrongful and unlawful conduct and negligence of the harbour board in removing and remooring two vessels so that both were lost, it appeared that they were so removed and remoored in order to make a clear course in the river for craft taking part in a regatta which took place in the afternoon of October 9, 1905. The case for the respondents was that they were moved from permanent and perfectly safe moorings and attached with their bows down-stream in a negligent manner to temporary moorings, which were unfitted for anything but normal weather; and that it was the duty of the appellant board to have seen that the vessels were returned to their permanent moorings immediately after the termination of the regatta, or to have taken steps to make the new moorings safe under the weather conditions which occurred.

The vessels having been carried away by a flood, the appellants contended that it was of so abnormal and unprecedented a character that it could not have been foreseen or provided against, and that the accident would have occurred if the vessels had remained at their original moorings. They also contended that the port was under Act 36 of 1896 a compulsory pilotage port, and that the removing and remooring had not been carried out by a properly qualified pilot; and that the harbour-master was acting outside the scope of his employment and instructions, the regatta not forming part of the business of the port.

The Chief Justice found that the vessels were moored in a negligent manner; that the port captain was acting within the scope of his authority, and that the removal and remooring of the vessels was done by the servants of the appellants. He was of opinion that the vessels ought to have been moved back to their original moorings before the night of October 10. Hopley J. concurred, but was of opinion that great blame was not attributable to the appellants' servants, since the circumstances which took place were unexpected and probably

unexampled in contemporary human memory, and they had provided for an ordinary and normal state of things; he thought, however, that to moor three vessels together in the manner adopted in a river liable to be affected by sudden freshets and floods was a negligent act liable to cause damage in the event of anything unexpected or abnormal occurring.

Scrutton, K.C., and *T. F. Dawson Miller*, for the appellants, contended that, on the evidence, negligence was not proved against the appellants in view of the admitted character of the flood which caused the accident: see *Nichols* v. *Marsland*. (1) The port captain, in ordering the removal and remooring by the pilot Barrie without having first requested the owners of the vessels to remove and remoor the same, was acting ultra vires, and outside the scope of his authority and duty.

Sir R. Finlay, K.C., and *Mackarness*, for the respondents, contended that, on the evidence, the case of negligence against the appellants was fully proved. The flood was not unprecedented, and was sufficiently probable, after the heavy rains which had occurred, to necessitate caution. The regatta had been in previous years carried out under the direction of the harbour-master and his officials.

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April 2.

The judgment of their Lordships was delivered by the

EARL OF HALSBURY. These are consolidated appeals from a judgment of the Supreme Court of the Colony of the Cape of Good Hope.

The appellants are the East London Harbour Board, constituted under the Act No. 36 of 1896 of the Colony, and have the control and management of the harbour of East London. The respondents in the first appeal are the owners of the steam tug *Caledonia;* the other respondents are the owners of a coal hulk called the *Nini*. There were originally two actions. The action by the owners of the *Caledonia* was an action claiming 4000*l*. as damages sustained by reason of the alleged negligence of the appellants in removing from her berth and fastening improperly the *Caledonia* to a certain hulk called the *Alpha*,

(1) (1876) 2 Ex. D. 1.

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whereby the tug broke adrift and was lost. The owners of the *Nini* also brought an action, claiming 345*l.* for the damage occasioned to that vessel. By consent the actions were consolidated and heard together.

The action was tried before Sir H. De Villiers C.J. and Hopley J. on several days in the months of August and September, 1906. It appeared that the steam tug *Caledonia* was sent by her owners to be laid up at East London on August 30, 1905, and the *Nini*, a wooden hulk used for coals, was moored to the satisfaction of the harbour authorities somewhat lower down the river than the *Caledonia*. There is no dispute that these two vessels were properly and securely moored in their original positions, but by the authority of the harbour-master or port captain, as he is sometimes called, they were removed from their original positions, and (as is found by the Chief Justice and assented to by Hopley J.) they were not properly or securely moored in their new positions.

They were moved in order to make a clear course for a regatta which was to be held on October 9. In view of the temporary purpose for which the removal took place, less attention seems to have been paid to the moorings than if it had been intended to moor them permanently. The regatta took place. It was over at 4.15 on the afternoon of Monday, the 9th. It is found as a fact by the Court below that there would have been time to restore the *Caledonia* to her original moorings on this day, but neither then nor on the 10th were any steps taken to remove either of the vessels to her original moorings. At about 9.30 on the night of the 10th October an extraordinary freshet occurred. The *Caledonia* was driven out to sea at about 3.30 on the morning of the 11th, with her caretaker on board, and was never seen again. The *Nini* was sunk on the west bank of the river. Upon the question of fact, the Court below finds that the two vessels were lost by reason of the negligence of the harbour board officials. Their Lordships entirely concur with that finding. It would be difficult for them to differ upon such a question of fact as is here involved from the learned judges who saw and heard the witnesses—an advantage that their Lordships have not, of course, had.

The responsibility of the defendants for the acts of their officers is hardly susceptible of argument. It would be perilous to navigation in any port, if the authority of the port captain or harbour-master could be questioned. In more than one case it has been pointed out how dangerous a principle would be involved if such a question as the place of mooring or the method of mooring were not, in the first instance at all events, absolutely within his authority: *Reney* v. *Magistrates of Kirkcudbright.* (1) Their Lordships do not disagree with the reasoning of the Chief Justice, or with the view that a regatta was a legitimate use of the river. The motive of the harbour-master in ordering the shifting of the berths of the two vessels certainly does not make his act one outside the scope of his employment.

The attempted defence to the action that the moving and remooring were done under the orders of a competent pilot, one Barrie, and were part of his duties as done under the compulsory pilotage provisions of the 87th section of the Act No. 36 of 1896, is sufficiently answered by the fact that Barrie neither professed to act, nor, as a fact, did act, as a pilot at all. That he was a pilot was an accident. He was in the regular employment of the board, and was simply acting as their servant in what he did.

The most plausible defence was the extraordinary and unusual flood which occasioned the accident. But the circumstance that the vessels were moved from a much less dangerous position, and the fact that insufficient precautions were taken, while there was yet time (as both the learned judges find) to make better provision for their safety, notwithstanding the warnings given by the state of the weather and the gradual increase of the flood, are fatal to such a defence.

Their Lordships will therefore humbly recommend His Majesty to dismiss the appeals. The appellants will pay the costs.

Solicitors for appellants: *W. A. Crump & Son.*
Solicitors for respondents: *Boxall & Boxall.*

(1) [1892] A. C. 264, at p. 270.

[PRIVY COUNCIL.]

J. C.* 1908 Feb. 14, 24; April 2.

HOULDER BROTHERS & CO., LIMITED . . PLAINTIFFS;

AND

COMMISSIONER OF PUBLIC WORKS . . . DEFENDANT.

COMMISSIONER OF PUBLIC WORKS . . . DEFENDANT;

AND

HOULDER BROTHERS & CO., LIMITED . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF THE CAPE OF GOOD HOPE.

Contract for Sale and Delivery of Coal by Shipments—Construction as to Clause for Demurrage—Consignors not limited to the Shipowners' Claim—Indemnity—Novation.

In an action by the vendors and consignors of coals under a contract binding the consignee to accept delivery to the railway authorities immediately on their arrival in port "at the rate of 120 tons per day for sailers and 250 tons per day by steamers," or to be "liable for demurrage at 4*d.* per net registered ton per day for sailers and 6*d.* per net registered ton per day for steamers," to recover demurrage in respect of eight ships calculated according to the specified rate:—

Held, that both upon the plain words of the contract, and also as explained by the action, conduct and mode of dealing of the parties antecedent to its date, it was an absolute and not an indemnity contract. It could not be so construed as to import into it a condition that the consignee was only liable to pay the amount of demurrage due by the consignors under the terms of their charterparties, so far as it did not exceed the contractual total.

Held, also, that by the indorsement and delivery of eight bills of lading in respect of these cargoes (only three of which incorporated the conditions of the charterparties), the consignee did not become bound by way of novation to pay demurrage as stipulated by the charterparties, and was not discharged from the obligation in respect thereof as imposed by the contract sued upon.

Even if the contract had been strictly c.i.f., there is no rule of law that a vendor thereunder, who is also consignor, may not secure for himself a profit under a demurrage clause; nor any indisputable presumption of law that the parties did not so intend.

CONSOLIDATED cross appeals from a judgment of the Supreme Court (November 27, 1906) varying a judgment of Buchanan J.

* *Present:* EARL OF HALSBURY, LORD MACNAGHTEN, LORD ATKINSON, and SIR ARTHUR WILSON.

(March 1, 1906). The respondent Commissioner of Public Works appealed from the whole of the order of the Supreme Court, the appellants from so much of it as varied the order of Buchanan J.

The question was whether the latter were entitled to demurrage upon certain sailing ships chartered by them to fulfil their contract for sale and delivery of coal to the respondent at Cape Town; if so, upon what principle such demurrage is to be calculated; and further what, if anything, ought to be allowed the respondent in reduction of demurrage or by way of damages by reason of the said eight ships arriving at Table Bay within too short an interval of time.

The coal contract is contained in a letter dated August 7, 1901, set out in their Lordships' judgment. It was one of a series of nine contracts for the supply of coal to the respondent at Cape Town, Port Elizabeth, and East London.

The appellants claimed the amount which was due for demurrage calculated in accordance with the terms of the contract. The respondent contended in both Courts that the detention of the eight ships in question was due to the fact that the appellants, in breach of contract, caused or permitted them to arrive too close together and thus put upon the respondent the burden of discharging some 18,000 tons within one month instead of about 9000 tons per month, and he claimed in reconvention a sum equal to any demurrage for which he might be found liable. There were, however, concurrent findings of fact that a reasonable sum to be allowed the respondent on this head is 1200*l.*, and from this the appellants did not appeal.

The respondent further contended that by virtue of the delivery to him of the bills of lading for the cargoes in question a new contract was constituted by way of novation between the respondent and the shipowner, whereby a contract to pay demurrage at the charterparty rate to the shipowner was substituted for the contract to pay demurrage to the appellants. Both Courts decided against this contention.

It appeared that for the purpose of carrying the coal under the contract sued upon, as under all the other contracts of the series, the appellants chartered the necessary vessels on terms

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which were, as to lay days and rates of demurrage, more favourable to the appellants than those stipulated for as between the appellants and the respondent. As soon as a ship was chartered and loaded under the contract in question, as also under the other contracts of the series, the bill of lading together with the policy of insurance of the cargo of the vessel were, in accordance with the contract, handed to the Agent-General for the Cape of Good Hope in London, who thereupon advanced to the appellants two-thirds of the price of the cargo.

Evidence was given as to the course of dealing under these contracts, and a further contention was raised by the respondent, though not pleaded, that on the true construction of the contract sued upon the appellants were not entitled to charge the respondent with a larger sum by way of demurrage than the sum actually paid by them to the respective shipowners.

Buchanan J. gave judgment for the appellants for the whole amount claimed less the 1200*l.* allowed in reconvention. He did not specifically deal with the contention that the respondent's liability was merely co-extensive with that of the appellants to the shipowners.

The Supreme Court, on the contrary, upheld that contention, and directed an account to be taken of the appellants' liability for demurrage under the charterparties of the eight ships in question, not exceeding the amount stipulated between the parties to this suit under their contract.

The portion of the judgment of the Court delivered by the Chief Justice relevant to the respondent's construction of the contract, was as follows :—

" The question is whether under the contract itself the plaintiffs are entitled to charge the defendant with a higher rate of demurrage than the rate for which they were liable to the shipowners.

" Probably the reason why the learned judge was silent on the question is because it was not specifically raised in the pleadings, but if according to the true construction of the contract the only demurrage owing by the defendant is that which became payable to the shipowners, it is impossible for this Court to avoid an expression of an opinion upon the question.

" The plaintiffs' claim is based upon the contract, and before the

Court can decide upon the claim, it must definitely decide upon the meaning of the contract. It was a contract, not between a shipowner and charterer or consignee, but between vendor and purchaser.

"It stipulated that the defendant should 'be liable for demurrage at 4*d.* per net registered ton per day for sailers,' and if the other party to the contract had been the shipowner, the liability for demurrage would clearly have been incurred towards such shipowner. But the contract is for the supply of coal to the defendant, and it would be a most unnatural use of the word 'demurrage' to apply it to the damages payable by the purchaser of the coal for his delay in accepting delivery thereof.

"The more reasonable construction of the contract would, in my opinion, be to confine the defendant's liability for demurrage to the amounts payable by the plaintiffs themselves, not exceeding 4*d.* per net registered ton.

"The price fixed in the contract was to cover cost, insurance and freight, and whatever rate of liability the plaintiffs might incur for demurrage, the defendant was not to be liable for more than 4*d.* per ton per day.

"I am bound to say that this question was never distinctly raised between the parties in the course of the long correspondence which has been put in, but this may have been due to the defendant not being aware of the fact that the plaintiffs were themselves liable for a lower rate of demurrage than that which they charged against the defendant."

J. A. Hamilton, K.C., Bailhache, K.C., and *G. Hay Morgan*, for the appellants, contended that the terms of the contract between the parties were those contained in the letter of August 7, 1901, and no other. Under that contract the appellants undertook both the obligation of sellers of coal and of carriers thereof to its destination. They contracted to sell and deliver coal at Cape Town at an inclusive price to cover cost, freight, and insurance. The respondent was bound to discharge the vessels carrying the coal upon the terms of that contract, and in case of demurrage to pay the contractual sum stipulated for. He was not concerned in any way with the sub-contracts

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made by the appellants to enable them to fulfil their contract with him. This was not a case of novation. The evidence shewed that in every case under the series of coal contracts in question the respondent always paid to the appellants direct. In no instance did he pay to the shipowner or ship captain, but repudiated the claim whenever made by the ship. He never paid freight to the shipowner, but always to the respondent. He consistently denied all contractual relation with the shipowner, and acquiesced in the appellants' contention that he had nothing to do with the charterparties. The contention that the contract was one of indemnity was equally contrary to the whole course of dealing between the parties.

Sir R. Finlay, K.C., *Scrutton, K.C.*, and *D. E. Leck*, for the respondent, contended that on the true construction of the contract in suit the stipulated demurrage meant the demurrage which the shipowners might be entitled to receive as compensation for the delay of their vessels, and that he was only liable for the amount which might be recoverable by them from the appellants, not exceeding the amount specified in the contract sued upon. It was a condition precedent to anything being recoverable for demurrage by the shipowners that they should have made monthly shipments according to the contract. As a consequence of their failure to do so in the quantities and at the times contemplated, the respondent was prevented from taking delivery as speedily as he would have done if the coal had been duly despatched. Delay by the respondent was caused by the default of the appellants, and the obligation to pay demurrage at all did not arise. If it did, it was limited to indemnifying the appellants against their shipowners' claim. And the respondent in reconvention was entitled to set off his claim for damages for breach of contract to deliver at stipulated times. Had the contract been duly performed, the amount of demurrage payable under the charterparties by the appellants would have been less than the sums which they had already received from the respondent in that respect. Reference was made to *Ireland* v. *Livingston* (1); *Dupont* v. *British South Africa Co.* (2); *Tregelles* v. *Sewell* (3);

(1) (1872) L. R. 5 H. L. 395, 406. (2) (1901) 18 Times L. R. 24.
(3) (1862) 7 H. & N. 574.

Nelson v. *Nelson Line, Ld.* (1); *Calcutta and Burmah Steam Navigation Co.* v. *De Mattos.* (2)

Hamilton, K.C., replied.

The judgment of their Lordships was delivered by

LORD ATKINSON. In these consolidated appeals from a judgment of the Supreme Court of the Cape of Good Hope, sitting as a Court of Appeal, dated November 27, 1906, varying, as therein appears, the judgment of Buchanan J., dated March 1, 1906, two questions arise for decision, namely, (1.) whether Houlder Brothers & Co., Limited (who will be referred to as the appellants) are entitled to demurrage upon certain sailing ships chartered by them to fulfil a contract made by them with the Commissioner of Public Works (who will be referred to as the respondent) for the sale and delivery of coal to the respondent at Cape Town, and, if so, upon what principle such demurrage is to be calculated; and (2.) what (if anything) ought to be allowed to the respondent in reduction of demurrage, or by way of damages, by reason of the arrival at Cape Town of several of these ships within the same month at intervals of only a few days.

The decision of the first question turns wholly, that of the second question mainly, upon the construction of the contract in writing into which the parties entered. That contract is contained in the appellants' letter to the respondent, dated August 7, 1901, accepted by the respondent by letter on the next day.

The former letter is in the terms following:—

"London, 7th August, 1901.

"To the Agent-General for the Cape of Good Hope,
100, Victoria Street, Westminster.
Requisition, Cape Town, 7685.
Requisition, Algoa Bay, 7686.

"Sir,—We have the honour to acknowledge the receipt of your favour of the 2nd instant, enclosing us copy of cable received by you from the Hon. The Commissioner of Public Works, in which our terms and prices as cabled out by you for the supply of coal has been accepted.

(1) (1908) 24 Times L. R. 315.
(2) (1863) 32 L. J. (Q.B.) 322; 33 L. J. (Q.B.) 214.

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"You ask us for a copy of a tender, evidently under a misapprehension, as the only offer we made was the cable just referred to; and, although that was for a twelve months' supply at the rate named, we are willing to accept in our turn six months' supply, on the following detailed terms:—

"(1.) That we are to supply 54,000 tons of Welsh coal for Cape Town at 1*l.* 16*s.* 5*d.* per ton c.i.f. and 60,000 tons for Port Elizabeth at 1*l.* 17*s.* 5*d.* per ton c.i.f. on monthly shipments for six months, such shipments to commence to Cape Town in February, 1902, and to Port Elizabeth in October, 1901.

"(2.) That the railway authorities are to accept delivery immediately on arrival in Table and Algoa Bay respectively, at the rate of 120 tons per day for sailers, and 250 tons per day by steamers, or the authorities to be liable for demurrage at 4*d.* per net registered ton per day for sailers, and 6*d.* per net registered ton per day for steamers.

"(3.) Payment to be made two thirds in cash by you within seven days of the receipt of policies, &c., and the remainder within seven days after the production of the certificate as to delivery.

"(4.) In the event of this country being at war, other than with the Transvaal, or other causes, including strikes, beyond our control, our liability to cease.

"We would thank you to kindly confirm this at your convenience, meantime we are purchasing the coal and making early arrangements for the commencement of the shipments to Algoa Bay in October.

"We are, Sir,
"Your obedient Servants,
"Houlder Brothers & Co., Limited,
"T. P. W. Forrester,
"Managing Director."

The coal to be delivered at Cape Town under this contract was dispatched in eighteen sailing vessels which arrived at Table Bay in the months of May, June, July, August, October, and December, 1902, respectively, with cargoes varying in weight from 4280 to 2006 tons.

The quantity arriving in each of these several months was in

tons as follows:—May, 2944; June, 10,072; July, 9865; August, 22,496; October, 7409; December, 2006.

The respondent, or those acting on his behalf, accepted delivery of these cargoes, though they complained of the inequality of the monthly supplies.

The appellants claimed demurrage amounting to 10,788*l.* 14*s.* 4*d.* in respect of eight of these ships, one of which sailed on May 31 and the seven others at different dates in the month of June, 1902. The three vessels which sailed on May 31 and June 1 arrived at Cape Town in the last week of the month of July, and the five others at different dates between August 16 and 27 following, both inclusive. The cargoes of these eight ships amounted in the aggregate to 26,380 tons, and if their rate of discharge be measured by the terms of the contract, as the appellants contend it should, they were each detained upon demurrage for a certain number of days, varying from twenty-nine to fifty-three. If the demurrage in respect of this detention be calculated at 4*d.* per registered ton per day (as provided in the contract) it amounts, on the registered tonnage of the eight vessels, to the sum sued for.

The appellants admit that this sum exceeds the sum recoverable, under the several charterparties into which they have entered, for demurrage in respect to these eight ships, but they claim to recover it on the ground that each of these several instruments is, as between themselves and the respondent, res inter alios acta; that the respondent has no concern with it and no rights under it; and that the mutual rights and obligations of the respondent and themselves are to be regulated by the terms of the agreement into which they have entered, and by these alone. The respondent, on the other hand, now contends that he is, as regards chartered ships, only liable to pay the amount of demurrage due under the terms of the several charterparties, that the agreement of August 7, 1901, is, as respects demurrage, only an indemnity contract (as it is styled)—that is, it fixes a maximum for anything beyond which he cannot be made liable—and that it is to be construed, in effect, in regard to all chartered ships, as if certain words had been written into it, and its second clause had run somewhat thus: "That the

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railway authorities are to accept delivery immediately on arrival in Table and Algoa Bay respectively at the rate *mentioned in the charterparty, under which any ship may be chartered to carry said coals, not to exceed* 120 tons per day for sailers and 250 tons per day by steamers, or the authorities to be liable for demurrage at the *rate mentioned in such charterparty, not to exceed* 4*d.* per net registered ton per day for sailers and 6*d.* per net registered ton per day for steamers," so that, in the result, the appellants could never make anything under this demurrage clause, but might lose much.

This contention is an afterthought on the respondent's part. Up to the commencement of this action the construction, now insisted upon by the appellants, not only of the contract sued upon but of several similar c.i.f. contracts earlier in date, was in letter after letter expressly admitted by the respondent to be their true construction.

The point now relied upon was not specifically raised in the pleadings, or dealt with by the trial judge, though it was stated by counsel at the hearing of the appeal in the Colony to have been mentioned to him. The plea filed by the respondent was not that the contract sued upon was an indemnity contract, in force up to the last, whose function it was to fix the maximum limit of his liability, but a kind of plea of novation, to the effect that by the indorsement and delivery to him of the eight bills of lading for the cargoes of these ships, only three of which documents, however, incorporated the conditions of the charterparties, he (the respondent) became bound by the obligations the several charterparties imposed as to the rate of discharge of the chartered ships, and as to the demurrage claimable in respect of them, but freed and discharged from the obligations imposed by the contract sued on in respect of these very same matters. Both the Colonial Courts held, in their Lordships' opinion rightly, that this plea could not be sustained, and in the argument of these appeals nothing was urged in defence of it. Indeed, on the facts and documents proved in evidence it is clear to demonstration, whatever may be its effect, that in order to construe the contract of August 7, 1901, as an indemnity contract in the manner suggested, it is necessary to attribute to

the parties to it an intention which, neither before nor at the time they entered into it, did they in fact entertain—an intention, moreover, which at all times down to the trial of the action they both, in effect, repeatedly disclaimed.

There is no doubt that the construction of a contract cannot be affected by the declarations of the parties made subsequent to its date, as to its nature or effect, or as to their intention in entering into it. But it is equally true that, where the words of the contract are ambiguous, the acts, conduct, and course of dealing of the parties before, and at the time, they entered into it may be looked at to ascertain what was in their contemplation, the sense in which they used the language they employ, and the intention which their words in that sense reveal. It is therefore necessary to consider what the action and course of dealing of the parties in this case was.

The appellants had for a length of time, in the course of their business, sold and delivered to the respondent at Cape Town and other ports in the Colony large quantities of coal, and up to the outbreak of the war in the Transvaal the appellants were bound to discharge this coal into railway trucks, or on the quays of the particular ports. This obligation, of course, made them liable for any demurrage the owners of the chartered ships which carried the coal might be entitled to, in respect of their detention. With the outbreak of the war everything was changed. It was seen that it might cause freights, rates of insurance, and demurrage to rise. Crowding at the South Africa ports, which was almost certain to occur, might render prolonged detention of vessels bound there very probable.

To meet this altered state of things, the parties (as was but natural) entered into special contracts in writing, nine in number, all c.i.f. contracts of the same general character, all given in evidence at the trial and printed in the respondent's Appendix. The first of these is dated August 29, 1900, the last September 22, 1902.

Under these contracts considerably more than half a million tons of coal were contracted to be sold and delivered to the respondent at different ports in Cape Colony.

In the first three the demurrage clauses are practically

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identical. They provide for the rate of discharge, and therefore for the number of lay days, but apparently not for the charge to be made per registered ton per day, and end with the words, so much relied upon by the respondent, "failing which, demurrage to be for and on account of the Cape Government Railways." In the fifth contract, dated July 5, 1901, the clause regulates the rate of discharge, but, like the three first, does not fix the charge per ton, and the words above quoted are omitted, while the fourth, dated June 20, 1901, the sixth (which is the contract sued upon), and the seventh, eighth, and ninth fix, by reference to the rate of discharge, both the number of lay days and the charge per registered ton per day, the seventh containing also in this connection the words "for account of railway." It appears from the correspondence which took place between the parties in reference, both to the making of the several contracts and to their fulfilment, that questions arose as to whether the liabilities of the respondent should be regulated by the provisions of his own contracts, or by those of the different charterparties into which the appellants had entered, for the hire of the ship employed. The contention put forward by the appellants now was as distinctly and expressly admitted by the respondent to be just and sound. This fact was not controverted in argument before their Lordships, and it is therefore unnecessary to quote the letters at length.

And not only is this so, but from first to last the course of action pursued by them was consistent with the appellants' present contention, and inconsistent with the respondent's. The charterparties were never given, or shewn, to him by the appellants. He never demanded to see them, or inquired as to their contents, but accepted as a grace, and with expressions of gratitude, what he now demands as a right. He never paid freight or demurrage to the shipowners, or entered into any correspondence or negotiations with them in reference to either of these matters. Everything was settled between the appellants and respondent without the intervention of third parties representing the shipowners.

The conduct of both parties in reference to the contracts earlier in date than that of August 7, 1901, but similar in

character, would certainly appear to be explicable only on the assumption that they considered that their respective rights and obligations were measured and determined by those instruments, to the exclusion of all others. It appears, therefore, to their Lordships, having regard to all that passed before August 7, 1901, to be impossible to contend that the contract of that date was not entered into by the parties to it in the belief, and with the intention, common to both of them, that the respondent would be bound by it to pay demurrage in conformity with its provisions, irrespective of the terms of any charterparty into which the appellants might enter.

But though the appellants throughout these transactions persistently insisted, to the full, on their legal rights, were profuse in the expressions of a desire to treat the respondent liberally, and only claim from him, in respect of demurrage, the sums they themselves had paid, or were under the charterparties liable to pay, they, apparently, managed to reconcile their generosity with their self-interest by overstating the amounts and thus making a handsome profit out of the transaction.

After the present action had been instituted, the respondent sued the appellants, in England, to recover the sums so overcharged, not on the ground that he had been induced to part with his money by the false and fraudulent representations of the appellants, nor yet (as he might have done if his present contention be well founded) on the ground that he was only liable for demurrage to the amounts claimable under the charterparties, but on the ground that he (the respondent) had paid the larger sums in ignorance of the fact that they exceeded the amounts represented by the appellants to be payable by them to the shipowner under the charterparties. The case was tried before Channell J., who, apparently, decided that the present respondent was entitled to recover the overplus thus paid by him, up to the month of September, 1901, but that, as it appeared upon the evidence that he had then notice of the fact that the appellants were obtaining from him more than they paid themselves, he could not recover anything in respect of payments paid after that day. Against this decision the present

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appellants appealed. The appeal was heard before the Lord Chief Justice and Buckley and Kennedy L.JJ. Their judgments (1), which are relied upon by the respondent, are printed in his appendix.

The decision of Channell J. was in effect upheld, and the true construction of the contract of August 29, 1900, and indeed of all the other eight contracts entered into, was held to be that contended for by the respondent in the present appeals. The Lord Chief Justice and Buckley L.J. referred in their judgments to a letter of September 13, 1900, written by the appellants to their own agents, a fortnight after the date of the first contract, and appear to have attached importance to it as indicating what was the intention of the appellants in entering into this and the subsequent contracts. Whatever be the true meaning and construction of this letter, and whatever its value, it has not been given in evidence in the present case, and their Lordships cannot therefore allow their decision to be in any way influenced by its contents.

It is conceded—and was apparently held by the Court of Appeal in this country—that if the appellants had employed their own ships, or if they had taken up ships which they had chartered under time charters, they would under these c.i.f. contracts have been carriers as well as vendors, and their rights to demurrage would have been regulated by the terms of the written contracts into which they had entered. But it is urged that the nature of these c.i.f. contracts is such that the vendor prima facie charters a ship for a voyage to carry the goods sold as agent for the vendee; that by the transfer of the bill of lading to the latter, whether it incorporates the conditions of the charterparty or not, or by the receipt of the cargo, the vendor makes his principal (the vendee) a party to the obligations of the charterparty, whether the charterparty be made known to, or be delivered to, the vendee or not; that the word "demurrage" when used in the contract sued upon can only mean the demurrage for which the vendee as transferee of the bill of lading, or receiver of the goods shipped, so became liable; and that the agent cannot make a profit out of a demurrage clause

(1) Not reported, dated November 21, 1907.

such as that contained in this agreement, though if it amounted to a contract of indemnity, as it was held it did, he might sustain a considerable loss. The learned Chief Justice of the Supreme Court in his judgment sums up the argument in favour of the construction of the contract sued upon in the following sentence: "The more reasonable construction of the contract would, in my opinion, be to confine the defendant's liability for demurrage to the amounts payable by the plaintiffs themselves, not exceeding 4*d.* per net registered ton. The price fixed in the contract was to cover cost, insurance, and freight, and whatever rate of liability the plaintiffs might incur for demurrage, the defendant was not to be liable for more than 4*d.* per ton per day."

The Lord Chief Justice of England in his judgment deals with contracts such as that sued on in the following passage: "I think that under the later contracts as under the earlier contracts they were cost, freight and insurance contracts; they did contain obligations which the vendor could enforce against the purchaser to take at a certain rate, and that if damage was caused to the vendor by the cargo not being taken out at that certain rate, they were to pay damage calculated on the basis of 6*d.* and 4*d.*"

According to this passage it would appear that the rate of discharge mentioned in the contract, and therefore the number of lay days, bind the consignee, even though that rate exceeds the rate mentioned in the charterparty, and the number of lay days thus fixed by the latter exceed the number fixed by the former. It was apparently found impossible to strike the provision as to the rate of discharge out of the contract altogether, though why this should not be done, if the charterparty alone is to bind the consignee on this question of demurrage, is not clear.

It is, moreover, difficult to see how the principle here laid down would work in practice. For instance, suppose a sailing ship, carrying a cargo of 1200 tons of coal under this contract, were by the charterparty bound to discharge at the rate of 100 tons a day or pay demurrage at the rate of 3*d.* per registered ton per day. Under the contract she would have but ten days

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to discharge, as she was obliged to discharge at the rate of 120 tons per day; under her charterparty twelve days. Assume that she is detained in unloading for fourteen days. Damage would thereby be caused to the vendors; but are they to receive demurrage for two days or for four? If the former, then the clause as to the rate of discharge is in effect struck out of their contract. And again, is the rate to be 3*d.* or 4*d.* per ton per day? If the former, then the damages are not calculated at the rate of 4*d.* a day, as it is laid down that they should be, and, if the latter, then the charterparty is superseded. The transferee of a bill of lading containing no provision touching demurrage, like five out of the eight given in evidence in this case, no doubt becomes liable for damages in the nature of demurrage if he should detain a ship beyond a reasonable time, but he is not, by reason of being such transferee, bound by the special provisions of a charterparty unless they are in some way incorporated in the bills of lading.

It is clear from the judgment of Lord Blackburn in *Ireland* v. *Livingston* (1) that where the consignor of goods under a c.i.f. contract executes an order received by him from another, he is, though a vendor, at the same time an agent, bound, for reward, to obtain the goods at the best price he reasonably can, and have them insured, carried, and delivered to his principal on the best terms he reasonably can. But where no commission is charged, the vendor takes upon himself the risk of a rise or fall in the price of the goods, or of freight for their carriage, or of the rate of insurance, and there is not, as to either cost or freight or insurance, any trust or contract of agency between them.

It may well be that, under a normal c.i.f. contract, the vendor who charters a ship for the carriage of the goods sold acts in so doing as the agent of the consignee, and, in the absence of any special agreements between them, is, under s. 32, sub-s. 2, of the Sale of Goods Act, 1893, bound to make a reasonable contract in that regard. But the contract sued on in this case is not a normal c.i.f. contract. Nor, as has been already pointed out, was it ever carried out by the parties to it as such contracts are and should be carried out. The fact that one-third of the price is

(1) L. R. 5 H. L. 395, at p. 407.

not to be paid till the cargo has been delivered, though according to the authorities it does not prevent the property in the goods from vesting in the consignee, yet gives the consignor a direct interest in the safe carriage and delivery of the goods, and so far differentiates this contract from a normal contract. And no reason is suggested why, if the appellants acted merely as agents for the respondent in chartering these ships, they should enter into an indemnity contract subjecting them to possible loss. There is, however, no rule of law that the vendor in a c.i.f. contract may not secure for himself a profit under a demurrage clause contained in it. Neither is there any indisputable presumption of law that the parties to such a contract did not intend that he should receive such a profit. To use the words of Lord Blackburn in *Calcutta and Burmah Steam Navigation Co.* v. *De Mattos* (1), in such contracts "there is no rule of law . . . . preventing the parties making any bargains they please."

And, with all respect to the learned judges sitting in the Court of Appeal in Cape Colony, as well as to those sitting in the Court of Appeal in England, it does not appear to their Lordships that the words of the contract of August 7, 1901—whether they be regarded as in themselves plain and unequivocal or as ambiguous, yet explained by the action, conduct and mode of dealing of the parties antecedent to its date—can have imported into them the qualifications already suggested, or be read subject to a condition to the like effect. So to construe this contract is, in effect, to make a new contract for the parties, which it is clear they never up to the commencement of the litigation believed they had made for themselves. It may well be that the contract, as interpreted by both Courts of Appeal, would be more equitable as regards the respondent than if interpreted as their Lordships think it must be; but the answer to that is that the parties must be bound by their own words, that the language they have chosen to employ is too precise and unequivocal, and their course of action too suggestive and uniform to permit a modification of the respondent's obligations in the direction desired. Their Lordships are therefore of opinion that the

(1) 32 L. J. (Q.B.) 322, at p. 328.

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decision on the construction of the contract appealed from by Houlder Brothers was wrong.

With regard to the appeal of the Commissioner of Public Works, their Lordships are of opinion that delivery of the several cargoes of coal shipped under the contract sued on having been accepted at Cape Town, the breach of contract of which he complains does not preclude the appellants from recovering demurrage for the detention of the ships carrying those cargoes; that his only remedy is in damages for breach of contract, and that the decision appealed from on this point is right.

Their Lordships will therefore humbly advise His Majesty that the appeal of Houlder Brothers & Co., Limited, ought to be allowed and the appeal of the Commissioner of Public Works dismissed; that the judgment of the Supreme Court (sitting as a Court of Appeal) of November 27, 1906, ought to be discharged, and that in lieu thereof the appeal of the Commissioner of Public Works from the judgment of the Supreme Court of March 1, 1906, ought to be dismissed with costs and the last-named judgment restored.

The Commissioner of Public Works will pay the costs of these appeals.

Solicitors for appellants: *Templer Down & Miller.*
Solicitor for respondent: *Herbert H. Sherriff.*

[HOUSE OF LORDS.]

MAYOR, &c., OF THE CITY OF WAKEFIELD . . . . . } APPELLANTS;

AND

WAKEFIELD AND DISTRICT LIGHT RAILWAY COMPANY . . . . . } RESPONDENTS.

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Rates—General District Rate—Assessment—"Land used only as a Railway"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*)—*Light Railways Act*, 1896 (59 & 60 *Vict. c.* 48), *s.* 12, *sub-s.* 2.

A company were the owners of a light railway constructed under an order made under the Light Railways Act, 1896. The railway, which physically resembled a tramway, was laid along certain open streets, and the order, while preserving to the public their ordinary right of passage over the highway, provided that the company should have the exclusive use of the railway for carriages with flange wheels. The company having been assessed to the general district rate in respect of their occupation of the railway:—

Held, upon the construction of s. 12, sub-s. 2, of the Light Railways Act, 1896, that s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, applied to light railways; and that, notwithstanding the user by the public of the surface of the streets in exercise of their right of passage, the company were occupiers of land used only as a railway constructed under the powers of an Act of Parliament for public conveyance within the meaning of s. 211, and were consequently entitled to be assessed to the general district rate in respect of the railway at one-fourth only of its net annual value.

Decision of the Court of Appeal, [1907] 2 K. B. 256, affirmed.

THE circumstances of this appeal and the arguments used in the Court of Appeal are set forth clearly and fully in the report of the decision of that Court.

The King's Bench Division (Ridley, Darling, and A. T. Lawrence JJ.), reversing the decision of the justices sitting as a Court of summary jurisdiction, held that the respondents were assessable to the general district rate in respect of their occupation of the railway at one-fourth only of the annual value thereof. (1) This decision was affirmed by the Court of Appeal (Cozens-Hardy M.R., Vaughan Williams and Buckley L.JJ.).

(1) [1906] 2 K. B. 140.

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WAKEFIELD CORPORATION v. WAKEFIELD AND DISTRICT LIGHT RAILWAY.

May 7, 8. *Macmorran, K.C.*, and *W. M. Mackenzie*, for the appellants, urged the arguments used in the Court of Appeal.

Danckwerts, K.C., and *Ryde*, for the respondents, were not heard.

LORD LOREBURN L.C. I think it is clear that the light railway company were here the occupiers; that the structure was "a railway" and was "constructed under the powers of an Act of Parliament." All the judges below have dealt with this matter exhaustively, and repetition of their views is not called for. The only point upon which I think there could be any difficulty is upon the question whether the land is "used only as a railway." I think that the user there referred to is the user by the occupier who is to be rated, and that the view of the Court of Appeal ought to prevail.

LORD MACNAGHTEN, LORD JAMES OF HEREFORD, and LORD ATKINSON concurred.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 8, 1908.

Solicitors: *Sharpe, Pritchard & Co., for W. W. Greenhalgh, Wakefield; Ashurst, Morris, Crisp & Co.*

[HOUSE OF LORDS.]

LARSEN . . . . . APPELLANT; H. L. (E.) 1908

AND

SYLVESTER & CO. . . . . RESPONDENTS. *May* 21.

Ship—Charterparty—Exceptions—Demurrage—Construction—"Or Hindrances of what Kind soever"—"Ejusdem generis."

By a charterparty the parties exempted each other from all liability arising from "frosts floods strikes . . . . and any other unavoidable accidents or hindrances of what kind soever beyond their control delaying the loading of the cargo":—

Held that, upon the natural and true construction of the clause, the parties, by inserting the words "of what kind soever," intended to exclude the doctrine or rule of ejusdem generis, and that the charterers were not liable for delay in loading caused by a block of other ships at the loading port.

In July, 1907, a steamship of the appellant was chartered by the respondents to proceed to Grimsby and there load a cargo of coal. A clause in the charterparty ran thus: "The parties hereto mutually exempt each other from all liability arising from frosts floods strikes lock-outs of workmen disputes between masters and men and any other unavoidable accidents or hindrances of what kind soever beyond their control either preventing or delaying the working loading or shipping of the said cargo occurring on or after the date of this charter until the actual completion of the loading."

The ship duly arrived at Grimsby, but owing to the block of vessels in the harbour was delayed in reaching the loading places, and consequently exceeded her loading time by 146 hours. The appellant having sued the respondents for demurrage in the county court, the learned judge gave judgment for the plaintiff for the amount claimed. The King's Bench Division (Phillimore and Walton JJ.) reversed that decision and entered judgment for the defendants, and their decision was affirmed by the Court of Appeal (Vaughan Williams, Farwell, and Kennedy L.JJ.). Hence this appeal.

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LARSEN v. SYLVESTER & CO.

J. A. Hamilton, K.C., and *Bailhache, K.C.*, for the appellant.
Scrutton, K.C., and *F. D. Mackinnon*, for the respondents.
Bailhache, K.C., in reply.

LORD LOREBURN L.C. My Lords, I think this judgment ought to be affirmed. In my opinion the hindrance which delayed the shipping was a block of steamers waiting their turn.

It was argued that this hindrance was not beyond the control of the charterers, because they had certain other ships which took turn before the vessel in question, and so delayed her. The best answer to that contention is that the facts do not shew that those vessels were responsible for the delay.

Then Mr. Hamilton argued that this hindrance was not within the words of the charter, and invoked the doctrine of ejusdem generis. The language used is "any other unavoidable accidents or hindrances of what kind soever beyond their control." Those words follow certain particular specified hindrances which it is impossible to put into one and the same genus. In *Earl of Jersey* v. *Neath Poor Law Union* (1) Fry L.J. referred to words of a similar kind, and indicated that you have to regard the intention of the parties as expressed in their language, and that words such as these, "hindrances of what kind soever," are often intended to mean, as I am sure they are in this case intended to mean, exactly what they say. It is impossible to lay down any exhaustive rules for the application of the doctrine of ejusdem generis, but I agree with Fry L.J. that there may be great danger in loosely applying it. It may result, as he says, in "giving not the true effect to the contracts of parties but a narrower effect than they were intended to have."

LORD ASHBOURNE. My Lords, I entirely agree with what has been said by my noble and learned friend upon the woolsack. The case has been argued with great force and insistence, and it has been stated that there are other cases looking to this one for decision.

A block for which neither of the parties was at all answerable

(1) (1889) 22 Q. B. D. 555, 566.

took place in the harbour and prevented the ship from arriving at its proper place within the time at which otherwise it would have been quite able to arrive.

It is alleged on behalf of the appellant that the block is not covered by the wide words used in the charterparty, "or hindrances of what kind soever beyond their control." It is obvious that the more natural construction would be that they meant something operative and were not meant to be dismissed by the phrase that they were only ejusdem generis.

I agree with my noble and learned friend upon the woolsack that the words of Fry L.J. were wise and reasonable words. I can see no reason in fact or in common sense, or upon the construction of the document, why I should seek to find any special ground for excluding the block that occurred from the general words.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD ROBERTSON. My Lords, I have fully appreciated the force of the argument which has been addressed to us on behalf of the appellant, an argument characterized not merely by ingenuity, but by great general soundness. I am bound to say that so far as I personally am concerned I should be well disposed to accede to that argument but for the words in the clause in question, "hindrances of what kind soever." I hope nothing will be deduced from our decision to-day which shakes the soundness of what is called the ejusdem generis rule of construction, because it seems to me that both in law and also as matter of literary criticism it is perfectly sound.

The parties may well have realized the applicability of tha rule to such contracts, and they insert these words, "of what kind soever," simply for the purpose of excluding that rule of construction. The effect of the insertion of these words is this: it excludes the limitation which would naturally arise from the context and gives to the word "hindrance" its full meaning.

The remaining question is, giving to the word "hindrance" its full latitude, Is the occurrence in question within it? I think that may be solved by a very simple test. Supposing this

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vessel to have arrived at its further destination and to have been asked, "You are very late, what has hindered you?" the answer would have been, "The hindrance was a block in the harbour." Upon that simple ground I think the decision which your Lordships propose is entirely in accord with the net result of the clause. As I have said, I should be sorry if it were inferred from our decision that we detracted from the reasonableness and the authority of the principles of construction which are called ejusdem generis.

LORD COLLINS. My Lords, I am of the same opinion.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 21, 1908.

Solicitors: *Woodhouse & Davidson, for Aske & Ferens, Hull; William A. Crump & Son.*

[HOUSE OF LORDS.]

H. L. (I.) 1908 *March* 26; *May* 22.

EVELYN VISCOUNTESS DE VESCI AND OTHERS . . . . . APPELLANTS;

AND

O'CONNELL . . . . . RESPONDENT.

Landlord and Tenant—Land Purchase Acts—Redemption of Liability for Rent out of Estate indemnified therefrom—Right over indemnifying Lands—Land Law (Ireland) Act, 1896 (59 & 60 *Vict. c.* 47), *s.* 33, *sub-s.* 4—*Land Judge—Jurisdiction—Appeal.*

Where any liability for rent is apportioned and redeemed out of the purchase-money of lands sold under the Irish Land Purchase Acts, and a right of indemnity in respect of such liability exists against other lands:—

Held, that under s. 33, sub-s. 4, of the Land Law (Ireland) Act, 1896, the person who has paid the redemption price is entitled to an annuity on the indemnifying lands equal in amount to the portion of the rent

which has been redeemed but ranking after the unredeemed portion of the rent.

Decision of the Court of Appeal in Ireland (reported as *In re Thomson's Estate*, [1907] 1 I. R. 311) reversed, and decision of Ross J., [1907] 1 I. R. 190, restored.

An appeal lies from the decision of the land judge to the Court of Appeal in Ireland, and from that Court to this House.

THE facts relevant to this appeal were thus stated by Ross J. in his judgment. (1)

By an incumbered estates Court conveyance dated November 4, 1854, certain townlands of Clontygora North and Clontygora South and Edentubber were conveyed, subject, in conjunction with other lands, to an entire fee-farm rent of 404*l.* 5*s.* 2*d.*, reserved by an indenture of fee-farm grant dated April 15, 1852 (made in lieu of a lease for lives renewable for ever), with such rights of indemnity in respect of an annual sum of 15*l.* 13*s.* 10*d.*, part thereof, against part of the lands comprised in the grant known as Hall's part of Monascreebe as were given by an indenture dated July 29, 1818, but liable to bear the residue of the said rent in indemnification of all the other lands liable thereto. The lands of Killeen, which have been sold in this matter, are portion of the other lands liable to the said rent, and they were, by another incumbered estates Court conveyance, dated May 9, 1855, conveyed, subject to the said rent of 404*l.* 5*s.* 2*d.*, with the like right of indemnity in respect of the said annual sum of 15*l.* 13*s.* 10*d.*, and also indemnified against the residue of the said rent by the said lands of Clontygora North and Clontygora South and Edentubber. By an order dated March 7, 1906, 16*l.* 7*s.* 5*d.*, part of the said rent of 404*l.* 5*s.* 2*d.*, was apportioned on the said lands of Killeen, and the residue of the rent on the residue of the lands comprised in the fee-farm grant, and by an order dated June 14, 1906, the said sum of 16*l.* 7*s.* 5*d.* was ordered to be redeemed out of the purchase-money of Killeen. Under these circumstances the vendor in this matter claims to be entitled to throw the 16*l.* 7*s.* 5*d.* on to the indemnifying lands. The remedy is under s. 33, sub-s. 4, of the Land Act of 1896.

Upon an application by the respondent, the person entitled to

(1) [1907] 1 I. R. 191.

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the purchase-money, Ross J. made an order declaring that the annuity of 16*l.* 7*s.* 5*d.* was to be inferior to the unredeemed portion of the head rent.

The Irish Court of Appeal (the Lord Chancellor (Sir S. Walker) and FitzGibbon and Holmes L.JJ.) varied the order below by an order declaring (inter alia) that the annuity was to have equal priority with the unredeemed portion of the land rent. Hence this appeal.

By s. 33, sub-s. 4, of the Land Law (Ireland) Act, 1896, "Where any liability for any annuity, rent-charge or rent is apportioned and redeemed out of the purchase-money and a right of indemnity in respect of such liability exists, the person entitled to the purchase-money shall be entitled to the proportion of the annuity, rent-charge or rent so redeemed, in like manner as if he had purchased the same, and the Court, after due notice to all persons interested, shall make provision as to the future payment of such portion of the annuity, rent-charge or rent so purchased, and as to the land to be liable thereto, and such other provisions as appear to the Court necessary for carrying into effect this enactment."

March 24, 26. *D. F. Browne, K.C.*, and *J. H. Pigot* (both of the Irish Bar), for the respondent, took a preliminary objection to the competence of the appeal and argued that no appeal lies to this House, the decision of the Court of Appeal in Ireland being final: Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), s. 48, sub-s. 2; *Earl of Gosford* v. *Irish Land Commission* (1); *Reg.* v. *Barton.* (2)

Ronan, K.C., and *Herbert Wilson, K.C.* (*R. H. Macrory* with them (all of the Irish Bar)), for the appellants. The right of appeal is conferred in general terms—subject to exceptions, of which this is not one—in the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), ss. 3, 12, and in the Supreme Court of Judicature (Ireland) Act, 1877 (40 & 41 Vict. c. 57), s. 86. Under the Land Act of 1870 (33 & 34 Vict. c. 46), which, and not the Act of 1881, is the foundation of Irish land legislation, powers are given in ss. 32 and 40 to the Landed Estates Court,

(1) [1899] A. C. 435. (2) [1902] A. C. 268.

from which an appeal lay to the House of Lords. In *In re Harenc's Trustees' Estate* (1) the appeal was not allowed because the appellants had not been parties below; the general right was implied. In *Reg.* v. *Barton* (2) the appeal was incompetent because there would have been no appeal under the old practice; and in *Fullerton* v. *Provincial Bank of Ireland* (3), where estates had been purchased under the Land Purchase Acts, the objection was not even raised by the defendants. By the Act of 1896 an interchange of jurisdiction is created: s. 23, sub-s. 1 (*a*), (*c*). The matter originated in Ross J.'s court, and the order appealed from is an order of the Chancery Division.

D. F. Browne, K.C., in reply.

LORD LOREBURN L.C. My Lords, I think this preliminary objection fails. The sole ground upon which it is said that an appeal to the House of Lords is excluded is that the land judge must be treated as though he were the Land Commission by virtue of s. 31, sub-s. 4, of the Act of 1896; otherwise it is not questioned, and cannot be questioned, that an appeal would lie.

I think there is no ground for the objection. The section referred to is the case of a Court receiving new powers, and the measure of competence by which these powers are given is indicated by the words that the land judge shall have the powers "in like manner as if the land judge were the Land Commission." That does not affect the right of appealing from the land judge.

LORD ASHBOURNE. My Lords, this is a very important preliminary objection which has been discussed before your Lordships with a great deal of force. I confess that, although I am aware that your Lordships have all arrived at the conclusion announced by my noble and learned friend the Lord Chancellor, I entertain substantial doubts. I would be disposed myself to think that it was not the idea in framing this section that this jurisdiction was left open. Although, therefore, as regards the conclusion arrived at, I am prepared to acquiesce owing to the

(1) (1879) 3 L. R. Ir. 344. (2) [1902] A. C. 268.
(3) [1903] A. C. 309.

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weight of authority of those who hold that opinion, I myself entertain as regards the matter very considerable doubt.

LORD MACNAGHTEN. My Lords, I agree entirely with the opinion of my noble and learned friend on the woolsack.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD ROBERTSON. My Lords, in the view which I take the true starting point of this question is that we have here under appeal a decision of the Court of Appeal in Ireland. It has not been demonstrated that the jurisdiction which the Court was exercising was that of an arbiter and not in its ordinary functions. I should therefore hold that an appeal lay unless there were words of definite exclusion. Accordingly, finding as I do here a judgment of the Court of Appeal, and not being pointed to anything that takes away the right of the subject to appeal against that tribunal to the King in Parliament, I am constrained to hold that an appeal lies. Accordingly I absolve myself from a minute tracing of the several jurisdictions of the Land Commission and the land judge, and rest my judgment upon the simple ground.

LORD ATKINSON. My Lords, the land judge had, before the passing of the Act of 1896, powers somewhat kindred to those that are conferred upon him by this section, namely, to apportion incumbrances and rents and distribute purchase-moneys. In the exercise of that jurisdiction the orders which he made would be subject to appeal to the Irish Court of Appeal and from that Court to this House. I cannot come to the conclusion that the object of the section of the Act of 1896 to which your Lordships have been referred was to alter those powers so as to render them no longer subject to appeal to this House. I think they are merely conferring upon him extended powers very much of the same nature that he exercised before, and to effect similar objects, and therefore I think there is nothing in the objection.

LORD COLLINS. My Lords, I am of the same opinion.

The appeal was then heard upon its merits.

Ronan, K.C., and *H. Wilson, K.C.* (*Macrory* with them), for the appellants. Where lands are sold under the Act the whole fee simple is vested in the purchasing tenant although the owners of head rents or other superior interests are not parties to the proceedings. As FitzGibbon L.J. said, this is an instance "of working out an enactment that a thing shall be deemed to be what it is not." The person redeeming has a security for the apportioned amount of the redeemed rent, "in like manner as if he had purchased the same," which he has not. As James L.J. said in *Gover's Case* (1), "Where the Legislature provides that something is to be deemed other than it is, we must be careful to see within what bounds and for what purpose it is to be so deemed." So in *Ex parte Walton* (2), a case of disclaimer of a lease in bankruptcy, James L.J. said (3): "The object of the bankruptcy laws was merely to regulate the distribution of the bankrupt's assets between his creditors, and to relieve the bankrupt and his estate from future liability to his creditors. But it was never intended to affect rights and liabilities as between the creditor and a third party." "The Court," he says later, "is entitled and bound to ascertain for what purposes, and between what persons, the statutory fiction is to be resorted to." In *Hill* v. *East and West India Dock Co.* (4) Lord Cairns, speaking of the disclaimer clause in the Bankruptcy Act, 1869, declined to adopt a construction "for which there is no motive, and as to which there can be no explanation given," which would oblige the Court "to destroy the rights and property of third persons, without accomplishing any beneficial object whatever for the purpose of the bankruptcy." The words of the section, therefore, like those where a thing is "deemed to be" so and so, cannot be read literally; otherwise the whole of a head rent or annuity might ultimately be thrown on a fraction only of the original property charged. In *Owen's Estate* (*No.* 3) (5) Walker L.J. on s. 33 said: "By it where an annuity is payable in respect of the lands sold, but the lands have a right of indemnity against other lands, the purchase-money, once and for all, discharges the

(1) (1875) 1 Ch. D. 182, at p. 188.
(2) (1881) 17 Ch. D. 746.
(3) 17 Ch. D. at p. 755.
(4) (1884) 9 App. Cas. 448, 455.
(5) [1900] 1 I. R. 151, at p. 169.

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annuity by a redemption sum, and the person whose purchase-money has paid it is put in the place of the annuitant (by a supposed purchase), in order to enable him to assert the right of indemnity." It is only for the purpose of making the indemnity available that the respondent is deemed to have purchased the annuity, and not for the purpose of recharging it as part of the fee-farm rent on any of the lands freed therefrom by virtue of the order of March 7, 1906.

D. F. Browne, K.C., and *J. H. Pigot*, for the respondent. Where there is an indemnity, rent does not cease to exist after redemption. The person redeeming part of the land out of which the charge issued is in the position of a purchaser, "in like manner as if he had purchased the same." He is entitled pari passu to his proportion with the unredeemed residue of the rent. The power to apportion and redeem the rent is given in order to clear the title to the fee simple of the lands sold. No power is given to create a new rent which shall rank subsequent to the unredeemed balance of the original fee-farm rent which remains payable out of the indemnifying unsold lands. This is the principle applied in *Kemmis's Estate* (1), *Close's Estate* (2), and *Leader's Estate* (3), where the principle is thus stated: "Where lands subject to a superior interest consisting of a fee-farm rent have been sold to the occupying tenants through the Court, the redemption price of the rent is to be fixed at the sum which appears upon due consideration of all the circumstances of the case, the selling price of similar interests, the value of money, and of the fact that the redemption is compulsory, to be a fair value thereof; but the amount of the price ought not to be affected by the consideration of indemnifying the owner against loss of income by reason of the difference between the annual income and that of any investment in which the redemption money may be invested." All these considerations have had effect given them in the orders of the Court of Appeal.

Ronan, K.C., in reply. *Close's Case* (2) was not a case of apportionment.

The House took time for consideration.

(1) [1904] 1 I. R. 496, 500. (2) [1905] 1 I. R. 207, 371.
(3) [1904] 1 I. R. 368, 371.

May 22. LORD ASHBOURNE. My Lords, in this case the appellants insist that they have been damnified by the construction placed upon a section of the Land Law (Ireland) Act, 1896, within whose purview they did not come and which did not purport to apply to them.

The questions involved arise in reference to a fee-farm rent of 404*l.* 5*s.* 2*d.*—reserved by a fee-farm grant of 1852 (founded on an original lease of 1745) of which, so far as unredeemed, the appellants are now the owners—and depend on the construction of s. 33, sub-s. 4, of the above Act.

By a sub-lease, dated in 1818, part of the lands, called Hall's part, were demised, with covenants for perpetual renewal, to Robert Hall, subject to 17*l.*, Irish currency, in part of the rent reserved by the then last renewal of the lease of 1745, the residue of that rent being charged on certain of the lands comprised therein for the purpose of keeping R. Hall, his heirs and assigns, indemnified from the said rent beyond the said sum of 17*l.*

By an incumbered estates Court conveyance of 1854 certain of the lands held under the original lease were granted to certain parties subject to certain rents, and with the obligations and rights of indemnity therein stated. These lands are called in the case "the indemnifying lands."

By another incumbered estates Court conveyance of May 9, 1855, another part of the lands held under the original lease was granted to Henry Thomson, and they are called in the case "the indemnified lands."

The lessor was no party to the lease of 1818, and the grantor in the fee-farm grant was no party to the indemnities given by the conveyances of 1854 and 1855.

The indemnified lands were sold under s. 40 of the Land Law (Ireland) Act, 1896, and by an order of March 7, 1906, "without prejudice to the existing rights of indemnity," Ross J. apportioned the fee-farm rent of 404*l.* 5*s.* 2*d.* between the indemnified lands and the other lands granted by the fee-farm grant, and 16*l.* 7*s.* 5*d.* was apportioned on the indemnified lands, and 387*l.* 17*s.* 9*d.* on the other lands. By the same order it was ordered that the said 16*l.* 7*s.* 5*d.* should be redeemed, and the redemption price was soon after fixed at 450*l.* 4*s.*

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This redemption was entirely compulsory, and on the fixing and payment of the redemption price the appellants' rights and interest in the indemnified lands were gone. There remained, however, the adjustment between the grantees of the different portions of the lands comprised in the fee-farm grant of the rights of indemnity referred to. The respondent raised the question involved in this appeal by a motion before Ross J., that the indemnifying lands should be declared well charged with an annual sum (practically equal to the sum redeemed) in equal priority with the said annual sum of 387*l.* 5*s.* 2*d.*, being the unredeemed part of the fee-farm rent of 404*l.* 5*s.* 2*d.*

It was obvious that this was a grave claim to start against the appellants' property. The indemnifying lands are not now a sufficient security for the portion of the fee-farm rent made primarily payable thereout, and the priority claimed was, as the respondent's counsel admitted, a complete change in the law and practice heretofore prevailing, but they urged that the claim could be supported under the literal construction of the section of the Act of 1896 already referred to.

Previous to the Act it was admitted that the claim could not be argued; the apportionment and redemption should be worked out by the orders of the Court, and the equities between the parties liable to, or having the benefit of, the indemnities should be adjusted inter se, possibly by litigation. This section was a new enactment in the Irish Land Purchase Code and enabled the land judge to deal with and adjust those equities.

The land judge in the present case decided against the priority claimed and held that it was the intention of the section to give to the person who had paid the redemption price an annuity on the indemnifying lands equal in amount to the portion of the rent which had been redeemed, but puisne, as theretofore, to the unredeemed portion of the head rent. The learned judge thought that the mind of the Legislature got into a state of confusion at a certain point in the drafting. I do not think so, but probably a few words might have been added with some advantage.

It would be startling and unjust to make an indemnity given by a tenant, and affecting only his own estate, operate so

injuriously on the estate of the landlord, although it would be beneficial, and possibly avoid expensive litigation, to have such a section to work out the equities between tenants inter se. The words of the section must be construed with some regard to what had been taking place in the Court and was its settled law and practice. "The same" in the section has to be read in connection with the fact that the lands have passed to new purchasers and that the part of the rent-charge redeemed is gone. The closing words of the section shew that the judge was given power to deal with the new needs of the position. It cannot have been intended, without express words, to drag the landowner in for the sole purpose of damaging his estate, while a sufficient purpose can be found in desiring to work out equities between those who were parties to the indemnities. If the larger part of the head rent was redeemed, and then an equivalent indemnity annuity was created which was to rank in equal priority with the residue of the fee-farm rent, payable out of lands unable to pay in full, it is obvious that the owner would find his residue diminished and imperilled. The Lord Chancellor of Ireland, in giving judgment, said that "the landlord is not within the purview of the section at all." In that I concur; but is not that a powerful reason for not damaging him by applying it to him? The Lord Chancellor also said that "in like manner as if he had purchased the rent" means as if he had purchased from the owner of the rent of 404*l.* 5*s.* 2*d.* But it must be noted that the section avoided the use of any such words.

Mr. Ronan, in his powerful argument for the appellants, relied on the cases of *Ex parte Walton* (1) and *Hill* v. *East and West India Dock Co.* (2) as supplying rules of construction which would leave your Lordships free to interpret the section reasonably and so as to avoid injustice.

Those two cases shew that a statute may be construed contrary to its literal meaning when a literal construction would result in a gross injustice, contrary to what must have been the purpose and object of the provision. In those cases the question turned upon the construction to be given to words of a Bankruptcy Act which said that upon disclaimer of a lease it should be deemed

(1) 17 Ch. D. 746, at p. 756. (2) 9 App. Cas. 448.

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to have been surrendered, and how far they could be held to bind the lessor. In *Walton's Case* (1) James L.J. said: "When the statute says that a lease which was never surrendered in fact (a true surrender requiring the consent of both parties, the one giving up and the other taking) is to be deemed to have been surrendered, it must be understood as saying so with the following qualification, which is absolutely necessary to prevent the most grievous injustice and the most revolting absurdity, 'shall as between the lessor on the one hand and the bankrupt, his trustee and estate, on the other hand, be deemed to have been surrendered.'" Jessel M.R. also used language strongly to the same effect, and held that the section must be read so as not to interfere with the rights of third parties. *Hill's Case* (2), which has the authority of this House, adopted and relied on the reasoning in *Walton's Case* (1) and laid down that before adopting a literal construction which would do obvious injustice it was essential to consider what is the object of the provision, and to see what its purpose is. Lord Cairns in his judgment said that to take the section literally "would be to do that for which there is no motive, and as to which there can be no explanation given, that is to say, to destroy the rights and property of third persons." Lord Blackburn strongly expressed the same view and held that the provision should be read as meaning that the lease was only to be deemed to be surrendered "so far as is necessary to effectuate the purposes of the Act and no further," and so avoid a cruel injustice.

It is to be regretted that, as your Lordships have been informed, these authorities were not mentioned in the Court of Appeal in Ireland.

I think that the order of the land judge was correct and the appeal should be allowed with costs.

LORD MACNAGHTEN. My Lords, I think the order of Ross J. was right. It seems to me that the learned judge did what he was told to do by s. 33, sub-s. 4, of the Land Law (Ireland) Act, 1896, and that he performed his task with a due regard to the equities of the parties interested.

(1) 17 Ch. D. 746.

(2) 9 App. Cas. 448.

The position of things may be described roughly, but with sufficient accuracy, in a very few words. Two persons, A. and B., are owners in severalty of two lots of land, which I will call lot A and lot B. These two lots originally formed one property. The property was subject to one entire fee-farm rent. On severance it was arranged that lot A should indemnify lot B. The superior landlord, of course, was no party to this arrangement. His rights and remedies were left untouched. As between lot A and lot B, so long as A. duly paid the head rent and kept lot B indemnified, there was nothing more that A. could be asked to do. Then comes the disturbing element of Irish land legislation. The occupying tenants on lot B purchase their holdings with money advanced by the State. In order to carry out the purchase it is necessary that incumbrances and charges should be cleared off. That is an essential condition in all cases of State-aided land purchase in Ireland. In accordance with statutory provisions in that behalf the head rent is apportioned. The amount thrown exclusively on lot B is then redeemed by the application of a portion of the purchase-money, to which all incumbrances and charges on the purchased property are transferred by the operation of the Land Purchase Acts, as amended by the Act of 1896.

Now, if it had not been for sub-s. 4 of s. 33, B.'s right of indemnity would still have remained in force for what it might be worth. The right of indemnity in such a case was expressly preserved from the very first. There is a saving clause to this effect in s. 33 of the Incumbered Estates Act of 1849. That clause is re-enacted in the very same words in s. 69 of the Act of 1858. But there are no provisions for adjusting equities until you come to the Act of 1896. So it would have been necessary for B., if the case had arisen before that Act, to have sued in Chancery for relief; and then probably A. would have objected that it was not his fault that a payment to the head landlord had been made out of purchase-money destined for B. The payment, he might have said, was not made at his request; he was, therefore, not liable for the consequences; certainly he was not bound to recoup B. for a voluntary outlay. Whatever his liability might be, that was not the bargain.

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Here I must part company with the learned land judge for a moment. I cannot agree with him in thinking that "at this point the mind of the Legislature . . . . got into a state of confusion." I think the framers of the Act saw the difficulty clearly and avoided it with no little skill. Instead of giving B. a charge on lot A for the amount deducted from the purchase-money, which might have been inconvenient to the owner of lot A, and was certainly never contemplated when the indemnity was created, it is explained that, in relation to the owner of lot A, B. is to be regarded as entitled by purchase to the rent apportioned in respect of lot B and redeemed out of the purchase-money advanced by Government. That, of course, is as between B. and lot A. The head landlord has nothing to do with equities between B. and A. As the Lord Chancellor of Ireland justly observes, the landlord is not within the contemplation of the section at all. For the apportioned rent thrown exclusively on lot B and then transferred to the purchase-money he has been fully paid. He is out of the case altogether.

I do not think that the framers of the Act are to blame for not deeming it possible that a land judge administering equity as between A. and B. would go out of his way to derogate from the rights of a third person who had nothing whatever to do with the matter in hand. The process vulgarly described as robbing Peter to pay Paul is not a principle of equity, nor is it, I think, lightly to be attributed to the Legislature even in an Irish Land Act. But that is exactly the effect of the order under appeal. As between A. and B., A. was primarily liable and B. was only surety. The order adjusts equities between A. and B. by giving B. a charge on the head landlord's securities and declaring that B. is to rank against those securities pari passu with the head landlord. The Lord Chancellor of Ireland says that is the plain meaning of the Act. I do not think the Act means or says anything of the kind. The Act says that "the person entitled to the purchase-money shall be entitled to the proportion of the . . . . rent . . . . redeemed in like manner as if *he* had purchased the same." The emphasis, I think, is on the word "he." In point of fact *he* did not purchase it. He did not want to purchase it. The State buys and charges him with the

purchase-money in the deal with the occupying tenants, but as regards the principal debtor the Act says he is to be treated as purchaser. Then the Act tells the land judge to carry out the transaction on that footing, leaving the details and the machinery to the judge's discretion.

I have only to add that the authorities cited on the one side and on the other do not seem to me to throw any light on the question before your Lordships. As I read the section there is no "statutory fiction" here. There is an illustration given to explain B.'s position and the rights intended to be secured to him. The illustration seems to me to be simple enough and easy of application, and it is followed by words giving the Court ample powers to carry the enactment into effect. On the other hand, canons of construction which may be of use when the language to be construed is ambiguous or contradictory are hardly wanted where the meaning is perfectly plain.

I think the decision of the Court of Appeal should be reversed with costs and the order of Ross J. restored.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD ROBERTSON. My Lords, I also concur.

LORD ATKINSON. My Lords, the question for decision in this appeal turns upon the construction of s. 33, sub-s. 4, of the Land Law (Ireland) Act, 1896.

It was a common practice in the Landed Estates Court in Ireland to sell a portion, or portions, of a tract of land, out of which a rent in fee farm issued, and by the conveyance to provide, as was provided in this case, that the portion, or portions, sold should be indemnified in whole or in part against payment of the fee-farm rent by the portions unsold. The liability thus thrown on the unsold portion ranked next in priority to the fee-farm rent, but the rights and remedies of the owner of that rent were entirely unaffected by this arrangement, to which he was an absolute stranger. The lands indemnified, and the lands by which they were indemnified (in this case conveniently styled the indemnifying lands), passed from the

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purchasers or owners to their respective heirs or assignees entitled to the benefit of this indemnity, or subject to the burden of it, as the case might be.

There is no doubt, I think, that the rights and equities existing between the owners of the indemnified and indemnifying lands, quoad the owner of the fee-farm rent and also inter se, were these. The owner of the rent might distrain for the entire of his rent on any portion of the lands out of which it issued, or he might recover it by any other means open to him from the owner of any one or more of such portions.

On the other hand, the owner of any portion of the indemnified land, who was compelled to pay any part of the fee-farm rent, would have a right in equity to be recouped out of the issues and profits of the lands by which his own lands were indemnified. The form of relief he would seek would probably be to have the sum so paid by him in discharge of the head rent declared a good charge on the indemnifying lands next in priority to the fee-farm rent, and to have a receiver appointed over these lands; but it does not, in my opinion, bear argument that if this course were taken the rights of the owner of the fee-farm rent would be prejudiced in any way or to any extent.

It is, I think, equally clear that, if the provisions of sub-s. 4 of s. 33 had never been enacted, and in any proceedings hostile to the owner of the indemnified land, which a sale under the Land Purchase Acts through the instrumentality of the Landed Estates Court may often be, the head rent had been apportioned, and the part of it assigned to the indemnified land ordered to be redeemed under the other provisions of the Irish Land Code, as has been done in this case, the owner of those lands whose money redeemed this portion would, by means of a similar suit, have been entitled to have the indemnifying lands declared well charged in his favour, with a sum equal to the redemption price, next in priority to the fee-farm rent. It may well be, however, that where the sale of the indemnified lands by their owner under the Purchase of Land (Ireland) Acts is a voluntary act on his part, he would not be entitled to this equitable relief at all. Provisions such as those contained in this sub-section were, therefore, absolutely necessary to protect the voluntary vendor from

serious loss, while even in the case of an involuntary vendor they gave relief in a form more convenient than the Court of Chancery could afford. I think, however, it is quite clear that the sub-section deals with the rights, obligations, and equities between the owners of the indemnifying and indemnified lands arising out of, and consequent upon, the indemnity, and with those alone. And as the indemnity did not touch or affect the rights or interests of the owner of the fee-farm rent, so neither should the relief founded upon it, granted under the provision of this sub-section.

The Court of Appeal have, however, held that the interests of the owner of the indemnified lands are to be protected by means which may seriously prejudice the interest of the owner of the portion of the fee-farm rent still unredeemed, and they apparently felt themselves driven to this conclusion by the following words contained in the sub-section—"the person entitled to the purchase-money shall be entitled to the proportion of the annuity, rent-charge, or rent so redeemed in like manner as if he had purchased the same." The sub-section, however, does not say "as if he had purchased the same from the owner thereof." And the very next provision of the sub-section shews conclusively that he is not placed in the position "of a purchaser from the owner"; because, whereas a purchaser from the owner would be entitled to recover the part of the rent purchased out of the lands from which either the whole rent originally issued, or at least out of the whole of the indemnifying lands, in the same right, by the same remedies, and subject to the same conditions as the original owner enjoyed, or was subject to, this hypothetical purchaser can only recover his portion of the rent out of such lands as the Court may direct, and subject to such provisions as the Court think necessary to carry the sub-section into effect.

It is not necessary in this case to express any opinion as to whether those latter words would include "lands" belonging to the owner of the indemnifying lands other than those out of which the fee-farm rent issued. It is clear, however, that the Court would have jurisdiction to direct that the portion of the head rent so hypothetically purchased should be paid out of a

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portion only of the indemnifying lands instead of out of the whole.

In this particular case orders for apportionment and redemption have been made by Ross J. They are not appealed against. The order appealed against presupposes, as it must, that redemption has taken place; otherwise it would not be authorized by the sub-section. And, if so, the portion of the rent redeemed has, under the provisions of the preceding section (s. 31), ceased to be a charge upon, or to issue out of, any land whatever. It is extinguished as a rent, and strictly speaking cannot be purchased by any one or from any one. But by what has been styled, rightly, it would appear to me, a legal fiction, the person whose money has redeemed this portion of the fee-farm rent is, as against the principal debtor, the person bound to pay the entire of the rent, and to save him from the payment of any portion of it, to be treated as if he had acquired by purchase the portion redeemed; the owner of the indemnifying lands thus continuing to pay a sum equivalent to the entire of the fee-farm rent, and the owner of the indemnified lands receiving from him annually a sum of money equal to the proportion of the rent which he has redeemed.

The rule of construction laid down in *Ex parte Walton* (1), and approved of and adopted in *Hill* v. *East and West India Dock Co.* (2), is therefore, in my view, applicable to the construction of s. 33, sub-s. 4, of this statute, and the sub-section accordingly must be held to be conversant solely with interests subordinate to the rights of the owner of the fee-farm rent, and cannot be applied in such a manner as to prejudice that person's security for the portion of his rent unredeemed. The sub-section must therefore, I think, be read as if this portion of it ran thus: "The person entitled to the purchase-money shall, *as between him and the owner of the lands by which the lands sold were indemnified*, be entitled to the proportion of the annuity, rent-charge, or rent so redeemed in like manner as if he had purchased the same."

With all respect to the Irish Court of Appeal, I think the decision appealed against was erroneous and should be reversed;

(1) 17 Ch. D. 756. (2) 9 App. Cas. 456.

that the order and judgment of Ross J. was right and should be restored, and this appeal be allowed with costs.

LORD COLLINS. My Lords, I agree.

LORD LOREBURN L.C. My Lords, I agree with the conclusion at which your Lordships have arrived. I think the words in question are to be construed to effect the purposes of the Act, and not to affect parties whom it was not the purpose of the Act to touch.

Order of the Irish Court of Appeal reversed and order of Ross J. restored with costs here and below.

Lords' Journals, March 26; May 22, 1908.

Solicitors: *Crawley, Arnold & Co., for S. S. & E. Reeves & Sons, Dublin; J. H. & K. R. Cobb, for Thomas F. O'Connell & Son, Dublin.*

[HOUSE OF LORDS.]

DAVIES . . . . . APPELLANT;

AND

SEISDON UNION . . . . . RESPONDENTS.

Poor Rate—Assessment—Sewage Farm let by Sewerage Board to Tenant.

A sewage farm was let by the owners (the sewerage board) to a tenant:—

Held, that in assessing the tenant to the poor rate in respect of his occupation of the farm, the rating authority, when estimating the rent which a hypothetical tenant would be willing to pay, must take into consideration not merely the actual rent paid by the tenant, but the benefit accruing from the farm as a means of enabling the board to discharge their statutory duties; and that the board was not to be excluded from the list of possible hypothetical tenants.

Decision of the Court of Appeal, [1907] 1 K. B. 630, affirmed.

A SEWERAGE board, having acquired a farm, spent money and turned it into a sewage farm, and let it to the appellant at a rent

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which was a fair rent for the tenant's advantages, including the manurial value of the sewage. Upon an appeal against a poor rate made upon the appellant the quarter sessions stated a case which is set out in full in the report of the decision of the Court of Appeal. The question raised by the case was whether the sessions ought to have taken into consideration not merely the sum payable by the tenant as agricultural tenant, but the fact that the farm afforded a means of disposing of the sewage of the board and thereby enabled them to fulfil their statutory duties. The King's Bench Division (Lord Alverstone C.J., Lawrance and Ridley JJ.) held that the sessions were right in not taking that matter into consideration. (1) This decision was reversed by the Court of Appeal (Sir Gorell Barnes, Farwell and Buckley, L.JJ.), who made an order which is set out in the judgment of Lord Collins in this House. Hence this appeal.

March 17, 19. *Ryde* and *Harold R. Ward*, for the appellant. The basis of assessment under the Parochial Assessments Act, 1836, is the rent at which the hereditaments may reasonably be expected to let from year to year. There is no justification for adding the value of any incidental advantages which may accrue to the tenant. In the *Erith Case* (2) the owner was regarded as a hypothetical tenant and assessed at a rate which such tenant would be willing to pay. In *Reg.* v. *School Board for London* (3) the school board was considered as the only possible tenant: see also *Burton-upon-Trent Corporation* v. *Burton-upon-Trent Union*. (4) These cases depend upon actual or hypothetical occupation. "The rate is to be on the occupier in respect of the beneficial nature of his occupation": per Lord Denman C.J. in *Reg.* v. *Grand Junction Ry. Co.* (5) In *Reg.* v. *Fletton Overseers* (6) the basis adopted was the actual rent received. So in *Reg.* v. *Rhymney Ry. Co.* (7) the railway company were held assessable at the full rateable value without regard to the benefit derived from the occupation. In *Sunderland Overseers* v. *Sunderland Union* (8),

(1) [1906] 1 K. B. 214.
(2) [1893] A. C. 562.
(3) (1886) 17 Q. B. D. 738.
(4) (1889) 24 Q. B. D. 197.
(5) (1844) 4 Q. B. 18, 36.
(6) (1861) 30 L. J. (M.C.) 89, 94.
(7) (1869) L. R. 4 Q. B. 276.
(8) (1865) 34 L. J. (M.C.) 121, 136.

which was a case of a tied public-house, Montague Smith J. said: "The contracts between the brewer and the publicans do not form a basis for either raising or diminishing the gross or net rateable value as defined by the statutes for the purpose of the valuation list under the recent Act." The whole lease, and not a particular covenant, whether onerous or beneficial, must be considered. The sewage work and plant are appliances for the efficient working of the farm in the nature of drainage and irrigation works and ought to be assessed as agricultural land of which the owners are not and cannot reasonably be expected to be occupiers.

Alexander Glen, K.C., and *Disturnal*, for the respondents. The true value of the property is not the money rental paid by the tenant to the landlords; the whole advantages of the occupation must be taken into consideration. The sewerage board must be treated as possible hypothetical tenants. They are under a statutory duty to dispose of the sewage, and the basis of the assessment is the amount which they would be willing to pay for land and appliances which are necessary to the fulfilment of those duties. The actual rent paid by the appellant cannot be the sole test; if it were, and the occupier gained no net profit, the result would be that there would be no assessment. The board have certain duties to discharge, and the test is what, if they do not as occupiers directly discharge those duties, they would be willing to pay to a tenant for discharging them.

Ryde in reply.

The House took time for consideration.

May 25. LORD LOREBURN L.C. My Lords, I agree with the Court of Appeal. The peculiarity of this case is that it touches both the ordinary and the exceptional methods of valuation familiarly applied in this country. The property assessed has an agricultural value, and it also has a value as part of a sewerage system. Both these values are put to use. The farm is rateable to begin with, because it is let to the appellant, who pays 490*l.* a year in rent for its agricultural use. The farm is also equipped with costly plant, consisting of carriers, distributors, and so forth, forming part of a sewerage system (used by

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the sewerage board, and undoubtedly of value to the board), which the appellant by the terms of his lease is bound to make available for distributing and deodorizing the sewage, and so to enable the board to dispose of it without breach of law. According to the usual practice such property would be rated, in respect of this latter value, upon the artificial basis adopted in such cases.

Here then is a property which can be and is utilized in two ways, both of them ways which are habitually reckoned for rating purposes. Why should not the rate imposed upon it be ascertained in reference to both these purposes? Or, in other words, why are we not to ask what rent would be given by a hypothetical tenant who had both purposes to serve and would pay a rent for the farm according to its double capacity? Manifestly, if the property were owned by some one other than the board, the latter would be such a tenant, and would use it for sewage purposes, either farming at the same time or subletting for agricultural cultivation. The only difficulty suggested is that in estimating what a hypothetical tenant would give in the way of rent the sewerage board is to be excluded from the list of possible hypothetical tenants. For what reason the only body which would certainly become a tenant in the present case is to be so excluded I do not know, nor is any case cited to establish such a doctrine. It is, in my opinion, inconsistent with the language of Lord Herschell in the *Erith Case* (1) and with other authority, and on principle I can find nothing to recommend it.

I am accordingly of opinion that the judgment of the Court of Appeal should be affirmed. At one time I had doubts in regard to the form of the order, which assumes that the actual rent of 490*l.* is to be taken as the value for agricultural purposes. But I think on consideration that it is right, having regard to the statement in paragraph 9 of the special case.

I desire to say that my noble and learned friend Lord Macnaghten, who is unable to be present, says that he agrees in this opinion.

(1) [1893] A. C. 562.

LORD ASHBOURNE. My Lords, I agree in substance with the Court of Appeal, but I consider that the form of its order should be modified.

I do not think that, having regard to the authorities, and particularly to the *Erith Case* (1), it is possible to exclude the sewerage board from the class of possible hypothetical tenants. But in my opinion the Court of quarter sessions should be left free to determine what effect, if any, this would have on the actual rateable value of the hereditaments in question. In the discussion in the Court of Appeal at the close of the judgments I gather that it was stated by at all events some of the judges that it would be open to the Court of quarter sessions to consider, in dealing with the position of the sewerage board as a possible hypothetical tenant, whether that would require a raising or a lowering of the sum payable by the appellant under the lease. It may be that the sewerage board, if it became a tenant, would have to undertake fresh expenditure for an overseer, wages, and buildings, and that this would leave them no better off than when in receipt of the rent under the lease. I do not at all know how this would be, but the Court of quarter sessions should be left quite free to consider and adjudicate on the whole matter. The frame of the actual order made does not do this. It leaves the rent under the lease as a minimum, and then directs that "beyond"—that means in addition to—this sum the Court of quarter sessions ought to take into consideration the position of the sewerage board as possible hypothetical tenants. I therefore think that the order of the Court of Appeal should be modified in the way I have indicated.

LORD ROBERTSON. My Lords, I agree in the opinion of the Lord Chancellor.

LORD COLLINS. My Lords, I agree in the reasoning and the conclusion of the Court of Appeal in this case, and I share Buckley L.J.'s astonishment that counsel should at this date contend that the doctrine that the owner may be treated as a hypothetical tenant in estimating the rent of a hereditament

(1) [1893] A. C. 562.

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for rating purposes must be limited to those cases only where the owner is in actual occupation. As pointed out in the Court of Appeal, this contention would seem to conflict not only with the reasoning of Lord Herschell in the well-known case of *London County Council* v. *Erith* (1), but also with his express words, as also with those of Lord Esher M.R., in the *London School Board Case* (2), which was approved in the first-mentioned case. Yet this, as far as I could follow them, was in substance the only argument adduced by the appellant's counsel in support of the appeal.

It is no doubt true that the question has naturally come up for discussion in cases where the owner was in actual occupation of the rateable hereditament whose assessment was under consideration, but it is difficult to see what possible bearing this fact could have on the question to be solved, namely, what rent would the hypothetical tenant be likely to give for the hereditament? The benefit to him would be precisely the same whether he had been in occupation before or whether he was deemed to be about to become the occupant. In truth, the main difficulty felt in treating the owner as a possible hypothetical tenant was the fact that he was in occupation. As Lord Herschell puts it in the *Erith Case* (3), "An owner who is in occupation of premises can, of course, never reasonably be expected to take them as tenant from year to year." The principle of the matter is that the parish is entitled to an assessment based on the highest rent that the hypothetical tenant may reasonably be supposed willing to give. The benefits in respect of which he is deemed willing to pay this rent will be just the same to him whether he has been in possession before or not, and therefore the assessment ought to be the same.

In the *London School Board Case* (4) Lord Esher M.R. says: "It follows, therefore, that it would be wrong to exclude the school board from the list of possible hypothetical tenants, *whether it is in the position of owner or in that of occupier*. That is the real question of principle, and is the question which was intended to be argued."

(1) [1893] A. C. 562.
(2) 17 Q. B. D. 738.
(3) [1893] A. C. at p. 596.
(4) 17 Q. B. D. at p. 740.

In the *Erith Case* (1) Lord Herschell says: "*Whether the premises are in the occupation of the owner or not*, the question to be answered is: Supposing they were vacant and to let, what rent might reasonably be expected to be obtained for them?" It is clear, therefore, that these two great authorities on rating law did not see anything in the appellant's contention.

Notwithstanding the laudatory observations of the Lord Chief Justice as to the clearness with which the point for decision is formulated in the special case, I confess it seems to me somewhat obscured by the introduction of irrelevant or alternative considerations. But I think that it is now clear, as the President has pointed out, that the question raised by the case is whether considerations which might have reasonably influenced the sewerage board itself, could it be deemed a hypothetical tenant, to pay a higher rent, were properly excluded from the assessment. I am clearly of opinion that the sessions were wrong in excluding them.

The appellant further took exception to the form of the order as expressed in the following words: "And this Court being of opinion that the Court of quarter sessions in order to arrive at the rateable value of the hereditaments in the said case mentioned ought to have taken into consideration *beyond the actual sum payable by the appellant under the lease in the special case mentioned* the position of the U. S. V. Main Sewerage Board, the owners of the said hereditaments, as possible hypothetical tenants of the said hereditaments, and the fact that the same hereditaments afford to the said board a means of disposing of their sewage, and thereby enable them to fulfil their statutory duties in that behalf, doth order that the matter of the said special case be remitted to the said Court of quarter sessions, so that the rate mentioned therein may be dealt with according to the principles hereinbefore stated."

Exception is taken to this order on the ground that it involves taking the same element into consideration twice over in the computation. In my opinion it does nothing of the sort. The rent actually payable by the existing tenant had been found by the sessions "to be a fair rent for the advantages which the

(1) [1893] A. C. at p. 588.

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tenant gets under the lease, including the value of the sewage. The said rent is more than it would be if the appellant did not get the manurial value of the sewage." This rent the sessions treat as representing the fair sum payable by Davies as agricultural tenant, and the question they put in their case is "Whether we ought to have taken into consideration *beyond the sum payable by the appellant as agricultural tenant* under the said lease the fact that the said farm affords a means of disposing of the sewage of the said sewerage board, and thereby enables them to fulfil their statutory duties in that behalf?"

It is to that question that the answer is given in the order as drawn. That answer merely tells them that they are to include elements which they had before by hypothesis excluded; therefore it clearly does not authorize the inclusion of any element of value twice over as contended by the appellant. The fact is that, in arriving at an estimate of what the sewerage board itself, if treated as a tenant, might be deemed as paying in return for the benefit of the occupation, all the elements of value considered in the case of the mere agricultural tenant would still come into calculation, and beyond and in addition to these any benefit peculiar to the board itself by reason of the facility incident to the occupation of performing a public duty.

The Court nowhere in their order assumes to decide any figures; it merely decides that a new element of value theretofore omitted must be introduced in the calculation.

In my opinion the appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 25, 1908.

Solicitors: *Dennison, Horne & Co., for George Green, Cradley Heath; James Mitchell, for Herbert Taylor, Wolverhampton.*

[HOUSE OF LORDS.]

LODGE HOLES COLLIERY COMPANY, LIMITED *v.* MAYOR, &c., OF WEDNESBURY.

H. L. (E.) 1908 *June* 30.

Local Government—Urban Sanitary Authority—Highway—Subsidence caused by Mining Operations—Action against Wrong-doer—Measure of Damages —Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 149—*Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *ss.* 10, 27.

A mine extended under a highway which was vested under s. 149 of the Public Health Act, 1875, in the local authority. While working the mine the owners let down the surface of the highway, which the local authority, in good faith and on the opinion of skilled advisers, restored to its former level at great cost. An equally commodious road might have been made at less cost:—

Held, that the local authority were not entitled to raise the road to the old level, cost what it might and whether it was more commodious to the public or not, and were only entitled to recover from the mine owners what it would have cost to make the equally commodious road.

Decision of the Court of Appeal, [1907] 1 K. B. 78, reversed.

Decision of Jelf J.; [1905] 2 K. B. 823, restored.

The facts material to this appeal will be found in the judgment of Lord Loreburn L.C.

May 6. *Sir Robert Finlay, K.C.*, and *Disturnal* (*Shearman, K.C.*, with them), for the appellants. The measure of damages is not the cost of restoration to the status quo, but the cost of making the road as commodious as it originally was. It was decided in this House in *West Leigh Colliery Co.* v. *Tunnicliffe and Hampson* (1) that loss by future subsidence cannot be taken into account, and no cause of action arises until actual damage is sustained. So long as the new road is equally convenient no damage is suffered. It was found as a fact at the trial that the injury caused by the appellants could be made good by an expenditure of 80*l.*, and that finding of fact cannot be disturbed. The decision of the Court of Appeal was given before the judgments of this House in the *West Leigh Case* (1), in which the decision of the Court of Appeal was reversed, and is wholly inconsistent with them. The judgments below are equally

(1) [1908] A. C. 27.

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inconsistent with Cockburn C.J.'s decision in *Lamb* v. *Walker* (1), approved in this House in *Darley Main Colliery Co.* v. *Mitchell* (2) and in the *West Leigh Case* (3). It was held in *Jones* v. *Gooday* (4) that the measure of damage is not the cost of restoring the status quo ante, but the difference in value before and afterwards. The respondents' powers are statutory only, and not those of an ordinary owner, and the amount of the damages to which they are entitled does not depend upon any discretion in them as to the mode of executing the repairs.

Macmorran, K.C., and *Hugo Young, K.C.* (*McCardie* with them), for the respondents. The appellants are tortfeasors; they have been guilty of committing a nuisance, for which they were liable to an action for an injunction. The road is vested in the respondents as a public body, and they are entitled and indeed bound to restore it to its former condition with all the amenities formerly attaching to it, and with the right so to restore is involved the right to make the wrong-doer pay for the cost of restoration. This right in its full measure, and without the limitation suggested by the appellants, was established in *Burgess* v. *Northwich Local Board* (5) and in *Atherton* v. *Cheshire County Council* (6) even in cases which affected innocent persons. The right of the respondents is to maintain and repair; and so long as they act in good faith and on skilled advice, as the respondents have acted in the present case, they are entitled to recover the cost of restoration.

Disturnal in reply. There is no absolute right or duty in law to restore the road to its former condition. The local authority is the surveyor of highways and cannot be compelled to raise a level. The only remedy against a surveyor of highways is by indictment, and there is no case of indictment when the surveyor has acted reasonably, as the respondents have not. Lindley J. in *Burgess* v. *Northwich Local Board* (5) expressly negatived the existence of the right.

The House took time for consideration.

(1) (1878) 3 Q. B. D. 389.
(2) (1886) 11 App. Cas. 127.
(3) [1908] A. C. 27.
(4) (1841) 8 M. & W. 146.
(5) (1880) 6 Q. B. D. 264.
(6) (1895) 60 J. P. 6.

June 30. LORD LOREBURN L.C. My Lords, this is an action by the local authority against mine owners whose workings have caused the road to subside, and there is no dispute except as to the amount of the damages.

The local authority restored the level by an embankment and retaining walls at a cost of about 400*l.*, and the mine owners said that this was quite unnecessary, and that an equally commodious road could be made for 65*l.* at the sunken level. They paid 80*l.* into Court.

Jelf J. found this sum sufficient to make an equally commodious road, and so judgment was entered for the defendants. (1) On appeal judgment was entered for the plaintiffs for 400*l.*

Now I think a Court of justice ought to be very slow in countenancing any attempt by a wrong-doer to make captious objections to the methods by which those whom he has injured have sought to repair the injury. When a road is let down or land let down, those entitled to have it repaired find themselves saddled with a business which they did not seek, and for which they are not to blame. Errors of judgment may be committed in this as in other affairs of life. It would be intolerable if persons so situated could be called to account by the wrong-doer in a minute scrutiny of the expense, as though they were his agents, for any mistake or miscalculation, provided they act honestly and reasonably. In judging whether they have acted reasonably, I think a Court should be very indulgent and always bear in mind who was to blame. Accordingly, if the case of the plaintiffs had been that they had acted on the advice of competent advisers in the work of reparation and had chosen the course they were advised was necessary, it would go a very long way with me; it would go the whole way, unless it became clear that some quite unreasonable course had been adopted.

But when the proceedings at the trial and the preceding correspondence are examined, it appears that this was not the plaintiffs' contention at all. They did not in fact consider how they could make an equally commodious road without unnecessary expense. Their position was that they were in law entitled

(1) [1905] 2 K. B. 823.

H. L. (E.) 1908 LODGE HOLES COLLIERY COMPANY, LIMITED v. WEDNESBURY CORPORATION. Lord Loreburn L.C.

to raise the road to its old level and to charge the defendants with the cost of so raising it. At the trial, as an afterthought, they also contended that the road would not in fact be so commodious to the public if it were made up on the lower level at the smaller cost. Jelf J. states in terms that these were the two contentions advanced, and this has not really been disputed.

My Lords, I regard the finding of Jelf J. as conclusive on the question of fact. It has not been assailed, and if it were, I need not repeat what has often been said as to the advantages enjoyed by a judge who has heard the witnesses. When a finding of fact rests upon the result of oral evidence it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons. The former practice of Courts of Equity arose from the fact that decisions often rested upon evidence on paper, of which an Appellate Court can judge as well as a Court of first instance.

The point of law which was advanced by the plaintiffs, namely, that they were entitled to raise the road to the old level, cost what it might and whether it was more commodious to the public or not, will not, in my opinion, bear investigation. Such a rule might lead to a ruinous and wholly unnecessary outlay. There is no authority for it, though there is authority to shew that as between the owners of a public road and the adjacent lands the former may be entitled to restore the ancient level. Even those who have been wronged must act reasonably, however wide the latitude of discretion that is allowed to them within the bounds of reason.

Accordingly, with the utmost respect to the Court of Appeal, I think the judgment of Jelf J. should be restored. The plaintiffs acted quite honestly, but under the mistaken belief that they were bound, or at least entitled, to maintain the ancient level at the defendants' expense. So thinking, they did not consider whether it was necessary to do so in the interests of the public and did not exercise a discretion on that question, so far as appears from the evidence before us.

LORD MACNAGHTEN. My Lords, I have had the advantage of reading and considering the judgment which has just been

delivered by my noble and learned friend on the woolsack, and I entirely agree with it.

LORD ATKINSON concurred.

Order of the Court of Appeal reversed and judgment of Jelf J. restored, with costs here and certain costs below.

Lords' Journals, June 30, 1908.

Solicitors: *Bower, Cotton & Bower, for Thursfield & Messiter, Wednesbury; Sharpe, Pritchard & Co., for Thomas Jones, Wednesbury.*

[HOUSE OF LORDS.]

KYDD (PAUPER) . . . . . APPELLANT;

AND

WATCH COMMITTEE OF CITY OF LIVERPOOL . . . . . RESPONDENTS.

Justice—Quarter Sessions—Jurisdiction of the High Court—Practice—Case stated from Quarter Sessions—Enactment that Order of the Quarter Sessions shall be final — Pension of Police Constable—Police Act, 1890 (53 & 54 *Vict. c.* 45), *s.* 11.

Where under s. 11 of the Police Act, 1890, there is an appeal to quarter sessions as to the amount of a constable's pension, the Court of quarter sessions may make such an order as appears to the Court just, and from that order there is no appeal.

Decision of the Court of Appeal, [1907] 2 K. B. 591, reversed.

Decision of the King's Bench Division (not reported) restored.

A POLICE sergeant in the Liverpool city police force having claimed a pension on his retirement, the watch committee refused to admit the claim. From this refusal the police sergeant appealed to quarter sessions, and the recorder gave judgment in favour of the claim, but stated a special case for the opinion of the High Court as to whether his judgment was

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right. The King's Bench Division (Lord Alverstone C.J., Darling and Phillimore JJ.) held that upon a true construction of s. 11 of the Police Act, 1890, they had no jurisdiction to hear the appeal. This decision was reversed by the Court of Appeal (Vaughan Williams, Fletcher Moulton, and Buckley L.JJ.), who held that there was jurisdiction. Hence the present appeal.

May 18. *Danckwerts*, *K.C.*, and *Leslie Scott* (*R. A. Wright* with them), for the appellant. The decision of the Court of quarter sessions was final and no appeal lay. Sect. 11 of the Police Act, 1890, is decisive—"nothing in this section shall confer a right of appeal." The recorder had no power to state a special case and the King's Bench Division no jurisdiction to hear it. In *Reg.* v. *Sutton Coldfield* (1) Blackburn J. said, "The Court has not in general any jurisdiction to review the decision of the Court of quarter sessions on any matter in which that Court had jurisdiction." The writ of certiorari was by s. 40 of the Summary Jurisdiction Act, 1879, made unnecessary where a special case is stated, and that writ had been taken away by s. 132 of the Municipal Corporations Act, 1835. In *Reg.* v. *Dickenson* (2) the Court entertained the special case by consent of the parties. In *Reg.* v. *Sutton Coldfield* (1), *Reg.* v. *Chantrell* (3), *Reg.* v. *Rippon* (4), and *Reg.* v. *Hunt* (5) the writ of certiorari was refused. That writ and the stating of a special case were forms of appeal on questions of law, and no appeal lies to the Court of Appeal or this House where the special case only deals with facts, the judgment on the case being in the nature of an arbitrator's award: *Burgess* v. *Morton*. (6) In *Upperton* v. *Ridley* (7) and in *Garbutt* v. *Durham Joint Committee* (8), both cases under the Police Act, 1890, no objection was raised and no opinion expressed as to the jurisdiction, and those cases are therefore no authority on the present appeal. As to the distinction between the judicial and the consultative functions of quarter sessions, see *Walsall Overseers*

(1) (1874) L. R. 9 Q. B. 153.
(2) (1857) 7 E. & B. 831.
(3) (1875) L. R. 10 Q. B. 587.
(4) (1837) 7 A. & E. 417.
(5) (1856) 6 E. & B. 408.
(6) [1896] A. C. 136.
(7) [1903] A. C. 281.
(8) [1906] A. C. 291.

v. *London and North-Western Ry. Co.* (1), per Lord Cairns and Lord Penzance. In *Westminster Corporation* v. *Gordon Hotels* (2), under the Public Health (London) Act, 1891, the word "final" was held to preclude any appeal from the decision of the magistrate. [They also cited *Rex* v. *Moreley* (3) and *Colonial Bank of Australia* v. *Willan.* (4)]

Avory, K.C. (*Rigby Swift* with him), for the respondents. This appeal appears to be founded on the decision of the House in *Westminster Corporation* v. *Gordon Hotels* (2), which, however, has no application. There is no analogy between proceedings at petty sessions and those at quarter sessions. There is no intention expressed in the statute to exclude the stating of a special case, and the decision of the recorder was not a final decision. In several Acts, from the time of the poor law of Elizabeth onwards, it has been declared that the decision of quarter sessions was to be final, but special cases have ever since been stated and adjudicated upon. On the appellant's theory *Sharp* v. *Wakefield* (5), under the Licensing Act, 1828, could never have been brought to this House. The right is not that of the litigants to appeal, but that of the quarter sessions to state a case. In *Rex* v. *Allen* (6) the Act gave power to quarter sessions "to hear and finally determine" appeals against convictions, and "no certiorari shall be allowed." Those words are held not to preclude the Crown from quashing the order of quarter sessions by certiorari. The *Sutton Coldfield Case* (7) is not favourable to the appellant. Blackburn J. there expressly states that "where the Court of quarter sessions on appeal makes an order either confirming or reversing the decision appealed against . . . . this Court will then on a certiorari . . . . quash or confirm the order of sessions, according to their view on the points of law submitted to them." The *Walsall Case* (1) supports the respondents' case. The decision of the recorder was a judicial order from which under the Judicature Act, 1873, s. 19, there is an appeal. See Mr. Herschell's argument, which

(1) (1878) 4 App. Cas. 30.
(2) Ante, p. 142.
(3) (1760) 2 Burr. 1040.
(4) (1874) L. R. 5 P. C. 417.
(5) [1891] A. C. 173.
(6) (1812) 15 East, 333.
(7) L. R. 9 Q. B. 153.

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was adopted by this House, and Lord Cairns' judgment. Buckley L.J.'s judgment is conclusive.

Leslie Scott in reply.

The House took time for consideration.

July 2. LORD LOREBURN L.C. My Lords, in this case the question is whether or not a Court of law has jurisdiction to entertain a special case, stated by quarter sessions, in regard to a point decided by quarter sessions under the Police Act, 1890, s. 11.

The King's Bench Division held that they had no such jurisdiction. On appeal, two members of the Court of Appeal expressed their personal concurrence in that view, but held that they ought to follow the example of your Lordships' House in the cases of *Upperton* v. *Ridley* (1) in 1903 and *Garbutt* v. *Durham Joint Committee* (2) in 1906. Accordingly the Court of Appeal reversed the judgment of the King's Bench and held there was jurisdiction.

Now it is beyond doubt that this House did set the example which was followed in the present case. The cases to which I have referred were special cases stated in regard to the very section in question, and this House, as well as the Courts below, entertained and decided them as though there were full jurisdiction. The explanation is that no question of the kind was raised at any stage by either party, and it does not seem to have occurred to any of the judges who heard these cases either in this House or in the Courts below that a proceeding so familiar as that of a case stated by quarter sessions was open to such an objection. Your Lordships, no doubt, are bound by that which has been determined in this House. No such point as is now raised has ever been determined here. It was indeed argued by the appellant that, on the contrary, the decision in *Westminster Corporation* v. *Gordon Hotels* (3) was a precedent in their favour. I do not think so. That decision related to a different Court, a different Act, and a different subject-matter. I think the point before us is an open point.

(1) [1903] A. C. 281. (2) [1906] A. C. 291.

(3) Ante, p. 142.

The learning and the law laid down as to other Acts of Parliament do not conclude the present case. We must look at the Act itself, subject-matter and language together, in order to find whether or not the Court of quarter sessions can pass on to the Courts of law, by asking advice or by inviting decision, these particular duties. In my opinion it cannot pass on these duties. The Act relates to police pensions or allowances and claims made in respect of them by constables or their dependants. Points of law may, of course, arise, for the rights are regulated by statute. Points of fact may be in controversy, as to good conduct, resignation, dismissal, and so forth. And there is a wide field for the exercise of discretion in giving or withholding allowances or in estimating conduct.

In short, there is room for the office of jurymen and of administrators, no less than, indeed more than, for that of judges, in the work laid upon quarter sessions. Probably that was the reason why quarter sessions were selected for the work. It is largely concerned with detail and with matters of business on a small scale, as to which litigation would probably be deprecated by the Legislature. The preponderance of business elements in these functions, the comparative smallness of the matter to be settled, might well incline the Legislature to prefer a summary method of treatment.

When the language of the section is closely examined, I think it shews that quarter sessions were meant to dispose of this business for themselves, and finally. A claim is made. If the police authority refuse to admit it, the aggrieved party may "apply" that his claim shall be reconsidered. If, on reconsideration, no redress is given, then he may "apply" to quarter sessions, and the duty of quarter sessions is thus stated: "that Court, after inquiry into the case, may make such order in the matter as appears to the Court just, which order shall be final."

I do not wish to express any opinion as to other Acts containing different words; and indeed the process of reasoning that because one set of words means one thing in one context other words or the same words in a different context must necessarily mean the same thing is often vexatious and fruitless. I confine myself to this particular clause. Where it says, speaking of

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such an order, that it is to be final, I think it means there is to be an end of the business at quarter sessions, and I am fortified in the view I take by knowing that the same view commended itself to the majority of the Court of Appeal, had they felt themselves free from precedents.

EARL OF HALSBURY. My Lords, I concur.

LORD ASHBOURNE. My Lords, I also concur.

R. A. Wright, for the appellant. My Lords, there may be a question about the costs. In the Court of Appeal the appellant was ordered to pay the costs, but he was not then a pauper. Will your Lordships' order be that the appellant should have the costs in the Courts below?

LORD LOREBURN L.C. My Lords, this is a pauper case before your Lordships' House, and I had thought that it had been a pauper case in the Court below. I do not know what course may commend itself to your Lordships, but it seems to me that we ought to give the successful appellant the costs in the Courts below, and that here the ordinary rule as to costs in the case of a pauper should be observed.

EARL OF HALSBURY. My Lords, I do not think this case has arisen before. There were costs incurred intermediately—that is, at a time when the appellant was not a pauper. I would rather suggest to your Lordships that we should consider this case; it is an exceptional case in my experience. I do not remember that I have ever known such a case to arise.

LORD ASHBOURNE. It arose lately in a case coming from Ireland. The proceedings only became in forma pauperis before this House—they had not been so before—but it did not affect the result in the order made by this House.

LORD LOREBURN L.C. Perhaps the best course would be to adopt the suggestion of Lord Halsbury, and, in order to spare the parties the necessity of coming here again, we will have the

proper entry made in the Journals of the House, and notice will be given accordingly. Is that what the learned counsel would desire?

R. A. Wright. Yes.

LORD LOREBURN L.C. My Lords, I ought to say that Lord Robertson, who is not able to be present, agrees with the judgment which has just been delivered.

Order of the Court of Appeal reversed. Order of the King's Bench Division restored, with costs both here and below. The costs of the appeal to this House to be taxed in the manner usual when the appellant sues in forma pauperis.

Lords' Journals, July 2, 1908.

Solicitors: *Pritchard, Englefield & Co., for Brighouse, Ryland & Co., Liverpool; F. Venn & Co., for E. R. Pickmere, Liverpool.*

[HOUSE OF LORDS.]

H. L. (E.) 1908 *July* 3.

ANDERSEN . . . . . APPELLANT;

AND

MARTEN . . . . . RESPONDENT.

Insurance (Marine)—Warranty of Freedom from Capture—Capture of Neutral Ship by Belligerents—Subsequent Loss by Perils of the Sea—Total Loss—Condemnation—Relation back of Title of Captor.

In a policy against perils of the sea the risk insured was only against total loss and "warranted free from capture." A neutral ship thus insured during the Russo-Japanese war was captured by the Japanese, and while being navigated towards a Court of Prize was wrecked and became a total loss. She was afterwards condemned in the Prize Court:—

Held, that there was in fact a total loss by capture and that the owner could not recover on the policy.

Decision of the Court of Appeal, [1908] 1 K. B. 601, affirmed on the above ground.

THE facts arising on this appeal are stated in the judgment of Lord Loreburn L.C.

May 19, 25. *J. A. Hamilton, K.C.*, and *E. M. Pollock, K.C.* (*Balloch* with them), for the appellant. The proximate cause of the loss of the ship was perils of the sea, and not the capture. The loss by capture was partial loss only, and there was no relation back to the date of the seizure. There was no property in the vessel, no right in re, until condemnation, although the captors had rights in rem. The *Romulus* was a neutral ship, and the cases relied upon by the respondents were cases of enemy vessels: *The Tobago*. (1) In *The Maria* (2) Sir W. Scott lays down the right of the captor as being "to visit and examine," and that the vessel should "submit to the inquiry proposed," "looking with confidence" to the decision of the appropriate tribunal to adjust all the rights and claims involved. The *Dispatch* (3) was a case of the rescue of a neutral by her crew, which resulted in condemnation. *Der Mohr* (4) decided

(1) (1804) 5 C. Rob. 218.
(2) (1799) 1 C. Rob. 340, 374.
(3) (1801) 3 C. Rob. 278.
(4) (1800) 3 C. Rob. 129.

that in the case of misconduct of a prize master there should be restitutio in integrum; and in *Der Mohr* (1), where the ship was lost by the prize master's negligence, though a portion of the cargo was saved and sold, there was a decree in toto against the captor. These authorities shew that the question was open until the adjudication of a Prize Court. Moulton L.J. confuses seizure and adjudication. Many things might happen between the former and the latter; peace, for example, might be declared in the interval. *Hahn* v. *Corbett* (2), cited by the Master of the Rolls, was the present case inverted, the wreck in that case happening first and the capture afterwards, and supports the appellant's contention, for it was held that the vessel was lost by perils of the sea and was insured by the policy. Here, too, the cause of loss was the wreck, and not the capture: there was a possibility that there would never be a condemnation at all. The text-writers state the law in accordance with these contentions. In Hall's International Law, s. 277, it is said: "The property remains in the neutral until judgment of confiscation is pronounced by the competent Courts after due legal investigation." Arnould, s. 829, says that the arrest and carrying in for adjudication of a neutral ship is not properly called "capture" at all, though certain consequences may flow therefrom. The loss and the right to the policy money were, therefore, not excluded by the warranty, which has no application, and the appellant is entitled to recover. The decision of the German Supreme Court of Appeal, before whom the same question arose, was against the respondents in the present appeal.

Scrutton, K.C. (*Bailhache, K.C.*, with him), for the respondent. Of what consequence is it what the German Court decided? The question turns not upon German law, but upon our law, if on any law. But in truth the question is one of fact. Was there a total loss by capture? Turning to the legal aspect, the doctrine of relation back to the date of seizure by the enemy's ship is stated by Lord Mansfield in *Goss* v. *Withers*. (3) In *Hamilton* v. *Mendes* (4) Lord Mansfield says that the law holds the ship to have been lost by the capture contrary to the real truth. The

(1) (1802) 4 C. Rob. 314.
(2) (1824) 2 Bing. 205.
(3) (1758) 2 Burr. 683.
(4) (1761) 2 Burr. 1198, 1211.

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doctrine is explicitly reaffirmed by Lord Blackburn in *Cory* v. *Burr*. (1) He says: "When by one of those 'perils' the subject assured is taken out of the control of the owners there is a total loss by that peril." In *Dean* v. *Hornby* (2) there was a total loss by piratical seizure. It was held by Sir W. Grant M.R. in *Stevens* v. *Bagwell* (3) that upon condemnation the property was in the captor from the date of the capture: so also *Morrough* v. *Comyns* (4); *Alexander* v. *Duke of Wellington*. (5) The doctrine was applied inversely in *Ruys* v. *Royal Exchange Assurance Corporation*. (6) The ship, which was insured against war risks, was captured, and notice of abandonment given, but refused by the underwriters. The war ended and the Prize Court decreed the vessel to be returned to the owners. The owners, however, were held still to be entitled to recover as for a total loss.

Pollock, K.C., in reply. The cases cited for the appellant relate to the property of enemies and not of neutrals. Here there was no notice of abandonment, as in *Hamilton* v. *Mendes*. (7) All prize in this country is the absolute property of the Crown, and there is no property before adjudication: *In re Banda and Kirwee Booty*. (8)

The House took time for consideration.

July 8. LORD LOREBURN L.C. My Lords, in this case the owner of the steamship *Romulus* insured that vessel for twelve months from January 12, 1905, in a policy expressed to be on disbursements. At the trial it was agreed, no doubt with propriety, that the rights under this insurance were to be determined as though it had been on hull and machinery. The perils usual in a Lloyd's policy, including perils of the seas, men-of-war, takings at sea, arrests, restraints, and detainments, appear in the policy. But the risk insured was only against total loss, and there is the following clause: "Warranted free from capture, seizure and detention, and the consequences of hostilities, piracy and barratry excepted."

(1) (1883) 8 App. Cas. 393, 398.
(2) (1854) 3 E. & B. 180.
(3) (1808) 15 Ves. 139.
(4) (1748) 1 Wils. 211.
(5) (1830) 2 Russ. & M. 35.
(6) [1897] 2 Q. B. 135.
(7) 2 Burr. 1198.
(8) (1866) L. R. 1 A. & E. 109.

The *Romulus*, a German vessel, sailed during the currency of this policy for Vladivostock, a naval port and base of naval operations in the war between Russia and Japan then raging. She carried coal, which had been proclaimed contraband of war. In order to avoid Japanese cruisers the *Romulus* took a circuitous course to the north, and was so injured by ice that the master made for Hakodate, a Japanese port, for refuge. On February 26, 1905, she was stopped by a Japanese cruiser in the Tsugaru Straits, some thirty or forty miles from Hakodate. A Japanese officer with seamen and marines boarded her, questioned her master, examined her papers, and announced that the ship was captured for carrying contraband. Judging that she could make the voyage to Yokosuka, he ordered the master to proceed thither, remaining himself in control. The *Romulus* accordingly shaped her course for Yokosuka, but made much water and altered her course. She then went aground, and, being unable to get her off, the Japanese officer was obliged to run her further aground at 2 A.M. on February 27. Ultimately she became a total loss as she lay. On May 16, 1905, after her destruction, the Japanese Court of Prize condemned both ship and cargo on the ground that the former "was employed transporting contraband of war by fraud"; finding also that her papers had been falsified.

In these circumstances the plaintiff claimed as for a total loss by perils of the seas. The defence was that the owner lost his ship by capture or seizure, or the consequences of hostilities, for which underwriters were not liable, and that subsequently the captors lost her by perils of the seas.

Mr. Hamilton, for the plaintiff, in the course of an argument which loses nothing of its merit by being unsuccessful, urged upon your Lordships that the owner, being a neutral, did not lose either the property in his ship or its possession by the arrest of February 26; that he still remained at risk on the *Romulus*, and only suffered present inconvenience with a prospect of expense and a possibility of total loss if ultimately she should be condemned. He had a chance, it was argued, better or worse, of recovering his ship by decree of the Court of Prize, even though the cargo should be condemned as contraband, and so

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still retained an insurable interest until the vessel became a total loss by the perils of the seas. Enemy vessels stand in some respects on a different footing from neutral vessels in regard to the laws of prize. Carriage of contraband to a belligerent port does not impart an enemy character to a neutral ship. She cannot lawfully be destroyed, nor her crew treated as prisoners of war. Carriage of contraband is not unlawful, as aiding an enemy in an expedition. It is an adventure which the offended belligerent may, if he can, visit with the penalty of capture and condemnation by a Court of Prize. I think it is true that in this case the property in the *Romulus* did not pass wholly from the owner on February 26. The owner still had a chance of recovering the ship and still remained so at risk that he might in law have insured her, and being insured already his policy was not necessarily at an end, though I cannot agree that he still retained possession.

All this, however, does not, in my opinion, avail the plaintiff, and indeed some part of it might apply to the vessel of a belligerent, for even an enemy merchantman may in some circumstances be released by a Prize Court. The real question is whether there was a total loss by capture, seizure, or detention, or the consequences of hostilities. I think there was in this case a total loss by capture on February 26, to say nothing of the other words, namely, seizure, and so forth. That was the day on which the *Romulus* was seized lawfully, as appears by the subsequent condemnation. There was on that day a total loss which, as things were then seen, might afterwards be reduced if in the end the vessel was released.

Suppose that the *Romulus* had been insured against total loss by capture on a time policy, had been taken safe to Yokosuka, and there condemned, but that the time policy had expired in the interval between the date of her seizure and the date of her condemnation. In such case, if the plaintiff's contention is sound, the very thing which the policy was designed to cover would have happened during the currency of the insurance, and yet by reason of the lapse of time in bringing her into port and obtaining a decree all recourse against underwriters would have been lost, and probably the owner could not have protected himself by

further insurance, or, if he could, only by payment of a ruinous premium. A contention which in such circumstances might make the liability of underwriters depend not upon acts done at sea or their lawfulness, but upon the degree of expedition shewn by a Court of Prize in adjudicating upon those acts, must surely be erroneous. If there were an appeal from the Prize Court which might not be decided for a long time, this observation would apply with increased force. I think the reasonable and true way of regarding what actually occurred is that there was in fact a total loss by capture on February 26, though its lawfulness was not authoritatively determined till May 16 following.

Accordingly I agree with the order made by the Court of Appeal. And it would not be necessary to say more were it not that our attention has been directed to a decision of the German Supreme Court of Appeal which proceeds upon an opposite view. It would not be consistent with the great respect due to that Court that I should offer any criticism upon its judgment, even if I felt myself competent, as I do not, to discuss German law. I can only say that, without in the least questioning the authority of that Court, I think the law of England is as I have said, and I am of course bound to advise your Lordships in accordance with what I believe to be the law of England.

EARL OF HALSBURY. My Lords, by agreement between the parties, I suppose to avoid a multiplicity of actions, the policy, which is actually a time policy for disbursements in respect of the ship *Romulus*, is to be treated as if for hull.

It is for total loss only, and is warranted free from capture, seizure, and detention, and the consequences of hostilities. These are now quite familiar words and give rise to no ambiguity, and the law is very clear that in this as in other regions of insurance law the immediate and not the remote causes of a loss are to be alone regarded.

This is an English policy, and the questions arising under it are to be decided according to English jurisprudence. I should have thought that, given the facts which the Lord Chancellor has pointed out and which I will not repeat, it would have been

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impossible in an English Court to deny that there was a total loss to the owner on February 26.

This very question arose just 150 years ago in *Goss* v. *Withers* (1), and was argued before Lord Mansfield, and he observed that a large field of argument had been entered into, and it would be necessary to consider the laws of nations, our own laws and Acts of Parliament, and also the laws and customs of merchants which make a part of our laws. After taking time to consider, the learned judge, delivering the judgment of the whole Court on November 23, 1758, then decided what would be enough to decide this case. After going through the whole law and discussing the question of how far and to what extent the seizure of the vessel affected the change in property, he says: "But whatever rule ought to be followed in favour of the owner against a recaptor or vendee it can in no way affect the case of an insurance between the insurer and insured. . . . . The ship is lost by the capture though she be never condemned at all nor carried into any port or fleet of the enemy, and the insurer must pay the value. If after condemnation the owner recovers or retakes her the insurer can be in no other condition than if she had been recovered or retaken before condemnation. The reason is plain from the nature of the contract; the insurer runs the risk of the insured and undertakes to indemnify. He must therefore bear the loss actually sustained."

Now I entirely concur with what was said in *Ionides* v. *Universal Marine Insurance Co.* (2), that the words here "warranted free from capture," &c., are to be construed as if these words were used in a policy against those events. Applying Lord Mansfield's words here, it seems to me that it would be a bold thing to argue against a judgment of the full Court of King's Bench presided over by Lord Mansfield, and 150 years after it has been accepted as the law during that period by every English tribunal. I think it is important to insist upon the exact form of the policy here, since I do not know what was the form of the policy upon which the German adjudication was founded. I neither understand that German judgment nor the reasoning by which it has been arrived at by the Court, but it is

(1) 2 Burr. 683.

(2) (1863) 14 C. B. (N.S.) 259.

obvious that we have neither the policy on which the Court was adjudicating nor the language of the Court itself.

I say this because the passage in which the Court expresses its disagreement with the English judgment (which is, I suppose, either that of Channell J. or of the Court of Appeal) is hardly intelligible, and though in the present case, as in the case before Lord Mansfield, it is immaterial to consider when or if at all the property was changed, I cannot let it be supposed that I entertain any doubt that the property was changed, and I do not think it is true that the earlier writers ever had any doubt that where, as in this case, the possession was taken by the hostile force and an adjudication of condemnation as prize by the proper tribunal followed on grounds recognized by the general consent of nations to be lawful cause of capture, the rightfulness of the seizure and consequently the change of property related back to the time of capture.

Here a neutral vessel was carrying, with the knowledge and consent of the owner, contraband of war (recognized as such by both belligerents) and furnished with false papers, and how any question could arise as to the lawfulness of the capture I am myself wholly unable to understand. The ship was a total loss from the moment she passed into the possession of the Japanese forces.

LORD ASHBOURNE. My Lords, I have had an opportunity of reading the opinions which have been delivered by my noble and learned friend on the woolsack and my noble and learned friend Lord Halsbury, and I entirely concur with them in the conclusion at which they have arrived.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 3, 1908.

Solicitors: *Woodhouse & Davidson; William A. Crump & Son.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1908 *May* 25.

TRAIN (Pauper) . . . . . Appellant;

AND

CLAPPERTON . . . . . Respondent.

Trust—Gift of Whole or Annual Income according to Trustees' Discretion—Assignation.

A testator died in 1899 having by a trust disposition and settlement directed his trustees to set aside and invest in their own names, as trustees, the sum of 5000*l.* and pay to his brother during his lifetime "either the whole or only a portion of the annual revenue thereof and that subject to such conditions and restrictions, all as my trustees in their sole and absolute discretion think fit."

The trustees paid to the brother 24*l.* 5*s.* only out of the income during five years. The trust was a difficult one to administer, the principal asset being the good-will and stock-in-trade of a public-house which the trustees were only able to sell in 1901. It realized much less than was anticipated. They then became involved in litigation with other legatees, and finally an action was brought by the assignee of the brother's interest under the settlement claiming the whole free income then available of the 5000*l.*:—

Held, affirming the decision of the First Division of the Court of Session, that the assignee had no higher right than the brother, and that he had no right to the total income in question, its disposal being left absolutely to the discretion of the trustees.

Appeal from the First Division of the Court of Session, Scotland. (1)

Hugh Buchanan, wine and spirit merchant, Glasgow, died on June 25, 1899, and by the third clause of his trust disposition and settlement directed his trustees "to set aside and invest in their own names as trustees a sum of 5000*l.* and to pay to my brother Andrew Buchanan during his lifetime either the whole or only a portion of the actual revenue thereof and that subject to such conditions and restrictions, all as my trustees in their sole and absolute discretion think fit. And after the decease of my said brother I direct my trustees to hold and apply, pay and make over said sum of 5000*l.* with any revenue accrued thereon that has not been paid to my said brother less

(1) (1907) S. C. 517.

the expenses of administration and dividing said fund to or for behoof of the whole lawful children of my said brother equally among them . . . . and in the event of my said brother dying without leaving lawful issue" the 5000*l.* was to fall into residue. The appellant Isabella Train raised this action as assignee under a bond and assignation in security for the sum of 650*l.* dated October 12, 1903, and granted by the above-mentioned Andrew Buchanan, who was the only brother of the testator Hugh Buchanan. The respondent A. E. Clapperton was the sole continuing trustee of the testator Hugh Buchanan. At the date of this action the trustees had been acting for five years and had paid Andrew Buchanan the following sums, namely, 18*l.* on November 13, 1901, in respect of his necessitous circumstances as set forth in their minute, 6*l.* on April 18, 1902, in respect that he was really destitute, and 5*s.*, being his fare from Glasgow to Motherwell. These sums amounted to 24*l.* 5*s.* and were all that were paid to Andrew Buchanan.

It appeared that the main property to be disposed of was a public-house; and it was admitted that the amount in the respondent's hands to meet the legacy of 5000*l.* was 2865*l.* 3*s.* 6*d.*, and that the funds had been earning only bank interest.

The respondents in their pleading stated that they had had much litigation with the next of kin; that after they had realized the public-house business the trust accounts shewed that the estate was insufficient to provide all the legacies; that the realization was not complete till April 18, 1901; that an action was raised on June 21, 1901, against them by Lillias Pollock and Janet Train (a sister of the appellant) and other legatees under the settlement; that in the course of such action the trust accounts were produced and many reckless and groundless charges of maladministration were made; that after a three days' trial Lord Kincairney held the charges against the trustees unfounded and condemned the pursuers in expenses; that in November, 1903, the First Division, having refused a reclaiming note, pronounced a decree for 403*l.* 14*s.* costs, and in 1904 the same Division pronounced a decree of absolvitor from the whole conclusions of the summons, with additional costs, which costs had not been paid; that the

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same agent acted for the pursuers in the above-mentioned action, and also for the appellant and the testator's brother, Andrew Buchanan; that in May, 1902, the said agent wrote to the respondents, intimating on behalf of Andrew Buchanan that an action was to be raised by him to reduce the settlement of 1899; that in 1903 the agent's authority to act for Andrew Buchanan was withdrawn, and the latter stated that the various documents of debt purporting to be signed by him, including the bond and assignation in security for 650*l.* the subject of this action, were, if signed by him, so signed under the influence of drink; and that he asked the respondents to make payment to him from the revenue of the said provision; that in consequence of the intimation of the bond and assignation to them, and of the intimation that an action was to be raised to reduce the settlement, the respondents informed Andrew Buchanan that they were not in a position meantime to make any payment to him.

The following were the material minutes of the trustees:— By their minute of November 13, 1901, the trustees instructed their agent, in respect of the necessitous circumstances of the legatee Andrew Buchanan, to pay to him the sum of 18*l.* to account of his interest in the trust estate. A minute dated April 18, 1902, further recorded that the agent explained that on Andrew Buchanan's arrival from abroad he had paid him 6*l.* to account of revenue on the strength of Mr. Buchanan's assertion that he was really destitute. The minute of May 1, 1902, contained the insertion of a letter written by agents on behalf of Andrew Buchanan, asking the trustees to pay over to him the whole income of a fund of about 3000*l.* or so in their hands. The trustees in the said minute gave their reasons why it was impossible to comply, and concluded, "the trustees could not tell what sum might ultimately be available out of revenue from which payments may be made at their discretion to Mr. Andrew Buchanan, and that in the meantime they proposed making him an alimentary allowance of 1*l.* a month." This allowance was not made. In a minute of October 30, 1903, the trustees recorded that they instructed the agent to make Andrew Buchanan a temporary allowance of 1*l.* a

month, proposed in the minute of May 1, provided he signed a minute of concurrence in and acceptance of the provisions in his brother's will. This was not acted on. By a minute of June 2, 1904, the trustees resolved to pay Andrew Buchanan the sum of 40*l.* out of income for his alimentary use only, not affectable by his debts or deeds, and they further instructed the law agents to raise an action of multiplepoinding to decide the rights of parties to that sum. In a minute of May 29, 1905, the trustees said "that they were not under any obligation to account to Andrew Buchanan's creditors or assignees, and that to make payment, either directly or indirectly, to them would be actually to defeat the very object the testator had in view in framing as he did the terms of the bequest in favour of his brother." They also resolved to cancel the previous resolutions regarding payments which had not been made, and in the meantime to pay Andrew Buchanan the sum of 15*s.* per week as a strictly alimentary allowance.

On January 19, 1906, the Lord Ordinary (Lord Salvesen) held that the appellant was entitled to the whole full revenue under deduction only of the sum of 24*l.* of the capital sum of 2865*l.* 3*s.* 6*d.*, and by a subsequent interlocutor found that the available income was 246*l.* 2*s.* 6*d.* On February 5, 1907 (1), the First Division recalled the Lord Ordinary's interlocutor and assoilzied the respondent and the other trustees from the whole conclusions of the action, giving the respondent his expenses out of the capital fund for behoof of Andrew Buchanan. The Appeal Committee allowed the appellant to appeal in forma pauperis on the ground that it could not be said that there was not a prima facie case.

May 22 and 25. *Munro* and *A. A. Fraser* (both of the Scottish Bar), for the appellant. Five years have elapsed since the realization of the testator's estate, and only 24*l.* 5*s.* out of the income from a sum of 2685*l.* has been paid to Andrew Buchanan. The trustees have never exercised their discretion with regard to the whole or part of the annual income, and they cannot do so now so as to defeat the appellant's right as assignee to the arrears of this income.

(1) (1907) S. C. 517.

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The minutes shew that the trustees have not on any occasion set themselves to find out what income was available for Andrew Buchanan. There was therefore no exercise of any discretion on their part. The whole income really belongs to the brother, and under his assignation passes to the appellant. The decision of the Lord Ordinary ought to be restored.

Younger, K.C., and *C. H. Brown* (the latter of the Scottish Bar), for the respondent, were not called upon.

LORD LOREBURN L.C. My Lords, I will not occupy your Lordships' time with this appeal, because it rests upon the statement of the appellant that the trustees who had the misfortune to be saddled with this duty have not exercised a discretion, or at any rate have not exercised a reasonable and sound discretion. I think your Lordships are satisfied that they have exercised a discretion; whether it was reasonable or sound I cannot possibly judge, because the facts are not before us, but it looks to me very like a most sound and reasonable discretion.

LORDS ASHBOURNE, ROBERTSON, and COLLINS concurred.

Younger, K.C., applied that as this was an appeal in forma pauperis, the respondent, who was a trustee, should be allowed his costs out of the estate.

LORD LOREBURN L.C. Let that be so.

Ordered, that the appeal be dismissed.

Lords' Journals, May 25, 1908.

Agent for appellant: *Herbert G. Davis, for A. W. Gordon, Edinburgh.*

Agents for respondents: *Robbins, Billing & Co., for F. J. Martin, W.S., Edinburgh.*

[HOUSE OF LORDS.]

DICK AND OTHERS . . . . . APPELLANTS;

AND

AUDSLEY AND OTHERS . . . . . RESPONDENTS.

H. L. (SC.) 1908 *May* 26.

Charity—Trust—Uncertainty—Residue.

A testator, by the last purpose of his trust disposition and settlement, after bequeathing a number of legacies to specific charities and public institutions, gave his trustees full power "at any time or times" . . . . "as and when the said residue or any part thereof becomes available, as they may deem proper, to pay over or divide the said residue or any part or parts thereof to or amongst such local or Scottish charitable institutions and schemes already constituted, or which may hereafter be constituted (and which may include those hereinbefore named), as they may select, or any one or more of such institutions and schemes, and that at such time, in such manner, or in such proportions, all as they in their absolute discretion may deem proper." The trustees were also to have the "fullest powers of and in regard to realisation, investment, administration, management, and division as if they were beneficial owners." They were further empowered to retain the investments of which the estate might consist at the time of the testator's death, "and that for such time or times as they may think fit or indefinitely":—

Held, affirming the decision of the First Division of the Court of Session, that the bequest of the residue was not void for uncertainty.

APPEAL from the First Division of the Court of Session, Scotland. (1)

The appellants James Dick and others were some of the next of kin of the late James Dick, gutta-percha boot and shoe manufacturer, Glasgow, who died on March 7, 1902, without issue, leaving a trust disposition and settlement dated March 4, 1902. The appellant James Dick was a nephew of the testator and was thus heir-at-law as well as next of kin, and he elected to collate the heritage. The appellants were claimants in an action of multiplepoinding and exoneration raised at the instance of the respondents, the late Sir W. R. Copland, J. E. Audsley, R. S. Murray, and Robertson, trustees under the trust disposition and settlement above referred to, the chief question being whether directions in the said will were effectual to constitute a valid

(1) (1907) S. C. 953.

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bequest of residue or whether the bequest was void for uncertainty. By the last purpose of the trust disposition and settlement, the testator, after stating that he believed that "I will be carrying out not only my own wishes but also those which inspired my late brother, in bestowing the residue of my estate in the form of donations and bequests of a benevolent and charitable nature.

"I do therefore leave and bequeath the following legacies, payable at such times as my trustees may find it convenient."

Then followed a number of legacies to specified charities and public institutions.

"And further, after satisfying the foresaid legacies, I direct my trustees to realise and convert into money the whole residue of my means and estate, but that always at such time or times, and from time to time, as they may think proper, and always having special regard to the arrangements for carrying on the business of R. & J. Dick, in conformity with the separate testamentary deed before mentioned, and to the provisions hereinafter mentioned as to the realisation of my investments, shares, stock, and other assets, and to hold, dispose of, and convey the same in such manner as I may direct or instruct by any codicil or codicils to this my settlement, or by any separate writing or memorandum executed by me, and failing such instructions, or in the event of there being any residue, after providing for such bequests as I may hereafter make, I hereby give and grant to my trustees, whether original, or assumed, or otherwise appointed, full power, and I direct them at any time or times, or from time to time, as and when the said residue or any part thereof becomes available, as they may deem proper, to pay over or divide the said residue, or any part or parts thereof, to or amongst such local or Scottish charitable institutions and schemes already constituted, or which may hereafter be constituted (and which may include these hereinbefore named), as they may select, or any one or more of such institutions and schemes, and that at such time, in such manner, or in such proportions, all as they, in their absolute discretion, may deem proper."

"And I provide and declare that my trustees shall, in addition

to the powers and immunities conferred, or which may be conferred on gratuitous trustees by statute, or to which they are entitled at common law, according to the most liberal interpretation, have the fullest powers of, and in regard to, realisation, investment, administration, management, and division, as if they were beneficial owners: And particularly, but without prejudice to the said generality, they shall have the following powers, all to be exercised or not, and if exercised, then at such time and in such manner as to my trustees, in their uncontrolled discretion, shall seem proper."

"And further, declaring that my trustees may, should they in their discretion see fit, retain the investments of which my estate may consist at the time of my death, including shares and stock and other assets, whether involving liability or of a speculative nature or both, and that for such time or times as they may think fit or indefinitely."

The respondents claimed under the above directions to retain in their hands the residue amounting to 613,388*l.* for distribution among such local or charitable institutions and schemes as they may select. The appellants maintained that the above directions were invalid on the ground of vagueness and uncertainty and that the residue had fallen into intestacy. Separate cases were lodged by the trustees appointed under earlier trust dispositions and settlements executed by the testator in 1899 and 1901.

The Lord Ordinary, Lord Dundas, on July 28, 1906, found (1.) that the bequest was not void from uncertainty, and (2.) that the settlement operated as a revocation of the prior settlements. On May 29, 1907, the First Division of the Court of Session adhered to the Lord Ordinary's interlocutor (1), finding all the parties in both Courts entitled to their expenses out of the trust estate.

C. A. Cripps, K.C. (with him *R. W. Orr, K.C.*, *J. Duncan Millar*, and *Munro*, of the Scottish Bar), for the appellants. The discretion conferred on the trustees here is so wide as to amount to a delegation on the part of the testator to his trustees of his testamentary power. An option is given to the trustees

(1) (1907) S. C. 953.

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to apply the residue to "charitable institutions and schemes already constituted, or which may hereafter be constituted." Then the class is not sufficiently particularized. "Schemes hereafter to be constituted" is too vague and uncertain. Secondly, the testator has made the trustees absolute judges of the time when the bequest is to be put into operation. They have power to postpone realisation "indefinitely." No case has gone as far as that. The bequest on these grounds is void from uncertainty. [He commented on *Hill* v. *Burns* (1) and *Morice* v. *Bishop of Durham.* (2)]

J. A. Clyde, K.C. (with him *W. J. Cullen, K.C.*, and *R. Scott Brown*, all of the Scottish Bar), for the respondents. The trustees are directed to convert into money the residue of the estate and to apply the proceeds as directed. They may divide the proceeds according to their discretion; but to say there is no direction is entirely wrong. There were many reasons why realisation should be postponed for a long time, the employees having the privilege of acquiring the testator's business of R. & J. Dick upon the terms that the capital should be repaid by instalments. It is quite true the powers given to the trustees are wide, but they are not unusual. The judgment of the Court of Session was correct.

J. M. Lees, K.C., *W. E. Vernon*, and *W. Ingram* (the first and third of the Scottish Bar), for prior trustees, were content with the judgment appealed from.

C. A. Cripps, K.C., in reply.

LORD LOREBURN L.C. My Lords, I do not think it is necessary to invoke in this case the rule that charitable bequests are an object of peculiar favour, because I do not think the points put by Mr. Cripps had any real substance.

With regard to the first question, whether the trustees have an option to apply any part of this fund otherwise than to the charitable purposes designated by the will, I do not think that is the true construction of the clause. I think the words which are used, "any part or parts thereof," have relation to the time or times when the distribution may become practicable by reason of the fund becoming available.

(1) (1826) 2 W. & S. 80, 90. (2) (1804) 9 Ves. 399.

With reference to the second point made by Mr. Cripps, whether the bequest is bad because there was an option to retain indefinitely and so frustrate the trust or so render uncertain its objects, I do not think that is the meaning of the clause. The word "indefinitely" appears to me really to be redundant, meaning the same in substance as the words "for such time or times as they may think fit." Of course, the administration of a trust is always subject to the control of the Court if there is maladministration. Even if the word "indefinitely" meant something much more than that, I am by no means satisfied that the will could be set aside on that ground, but the point does not arise.

EARL OF HALSBURY. My Lords, so far as I am concerned, I think the Lord Ordinary's judgment perfectly satisfies everything that ought to be said upon the subject.

LORD ASHBOURNE. My Lords, I agree.

LORD ROBERTSON. My Lords, I concur.

LORD COLLINS. My Lords, I agree.

Interlocutors appealed from affirmed. The appellants to pay the respondents, other than the trustees of the trust disposition and settlement of March 4, 1902, *the costs of this appeal; the said trustees to have their costs out of the trust estate.*

Lords' Journals, May 26, 1908.

Agent for appellants: *John Kennedy, W.S., for Inglis, Orr & Bruce, W.S., Edinburgh.*

Agents for respondents (Audsley and others): *Crowders, Vizard, Oldham & Co., for Henry Robertson, S.S.C., Edinburgh.*

Agents for respondents (Watt and others): *Neish, Howell & Haldane, for W. & F. Haldane, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1908 May 26.

TOAL (Pauper) . . . . . Appellant;

AND

NORTH BRITISH RAILWAY COMPANY . Respondents.

Negligence—Railway Company—Failure of Railway Servants to close Carriage Doors before starting the Train.

In an action of damages for personal injuries brought by a passenger against a railway company the pursuer averred that while standing on the platform of their station he was struck and injured by an open carriage door. That it was the duty of the defenders and the invariable practice of railway companies to close the doors of compartments before a train was allowed to leave the station, but this they negligently failed to do on the occasion of this accident, and thereby an open door caused the injury to the pursuer:—

Held, reversing the judgment of the Court of Session, that there was a relevant averment of negligence by the defenders, inasmuch as facts were averred from which a jury might infer negligence; and that the pursuer was entitled to a trial by jury.

Appeal from the First Division of the Court of Session. (1)

The question in the appeal was whether the action by the appellant, John Toal, cranesman, against the respondents, the North British Railway Company, for damages for personal injuries, ought to be tried by a jury.

On November 17, 1906, the appellant was a passenger by a train on the respondents' railway system and alighted at College Street station, Glasgow, and while standing on the platform the appellant was struck by an open carriage door on the train from which he had alighted, which had been restarted by the respondents' servants for the purpose of continuing its journey. In consequence the appellant was knocked down, fell on the rails and sustained injuries which necessitated the amputation of his left leg. The appellant pleaded (inter alia): "The said accident to the appellant was due to the fault and negligence of respondents' servants. When said train was stopped at said platform there were no porters or officials on the platform to see that the doors of the carriages were

(1) (1908) S. C. 48.

shut before the train was started. It is the duty of the respondents and is the invariable practice of railway companies to close the doors of compartments before a train is allowed to leave the station, but this the respondents and their servants culpably and negligently failed to do on the occasion of this accident to the appellant. The respondents and their said servants were also negligent in respect that they set said train in motion without closing said door. If the guard of said train or any of the respondents' porters had been on said station and had paid attention to their duty they would have closed the door that struck the appellant before the train was allowed to restart from said station and the said accident would have thus been avoided. The respondents' servants were also negligent in that they failed to have the lamps at said station lighted, as the station was in complete darkness at the time said accident happened, with the exception of the lights from within the carriages in which the appellant had been a passenger. If said platform had been lighted the appellant could have easily seen that said carriage door was swinging open, or some other passenger would in all probability have closed same, failing attention to their duty by the servants of the respondents, whose duty it was to close same before the train was allowed to restart. The respondents' servants were thus reckless and negligent and caused said accident to the appellant."

The respondents explained in answer "That the station was properly lighted and that the accident was caused by the fault and negligence of the appellant himself, or his own fault or negligence materially contributed thereto in not leaving the platform immediately after he alighted from the train and in running along the platform amongst the friends who were cheering the Celtic football team who occupied the saloon on said train and in failing to observe all necessary precautions to prevent himself from stumbling and falling over the platform."

The sheriff substitute (Boyd) allowed the appellant a proof; the appellant then asked the First Division of the Court of Session for a jury trial. This their Lordships refused, holding that the appellant's case was wanting in any relevance of averment against

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the respondents, the ground of their Lordships' decision being that it was impossible to hold that the respondents were negligent in restarting a train while the doors of the carriages were open, it being the common practice of railway companies, and indeed a matter of necessity for those conducting suburban traffic, to start trains with the carriage doors open. (1)

May 25, 26. *Munro*, and *J. A. Christie*, for the appellant. The appellant is entitled to place his case before a jury. It was the duty of the respondents in working their railway to take reasonable precautions for the safety of passengers, not merely while in their trains, but while upon the platform, and in starting a train with a carriage door swinging over the platform the respondents' servants failed to take such reasonable care as it was their duty to take. Whether the respondents' servants failed to take such reasonable precautions was a question of fact for a jury. A case undistinguishable from this was *Thatcher* v. *Great Western Ry. Co.* (2) ; there the door open was that of the guard's van, here it was a door in the middle of the train. The appellant offered to give proof that it was quite possible to close the open door, but that there were no porters present to close it.

A. Ure (Solicitor-General for Scotland), and *Forbes Lankester*, for the respondents. The judgment of the First Division was correct. The appellant had alighted from the train and does not allege that there was any obstruction to his leaving the platform at once or that the respondents had started the train with unusual rapidity. He could easily have moved away from the train, the open door only covering twelve inches of the platform. It is not negligence on the part of the respondents' servants to start trains before all the carriage doors are closed. The allegation that the train was started with an open door is not a sufficient relevant allegation of negligence. It is common knowledge that trains are so started every day.

LORD LOREBURN L.C. My Lords, the question here is whether the pursuer avers, and offers to prove, facts from which a jury might legitimately infer that this accident was caused by the neglect of the railway company; and I do not suppose that your

(1) (1908) S. C. 48. (2) (1893) 10 Times L. R. 13.

Lordships will conjecture whether or not that is the right conclusion, for it is really the province of the jury not only to ascertain the facts, but to draw their own inferences from the facts that are ascertained. I find in this case the pursuer says that the duty of the defenders was to close the door of the carriage before it started; that it was their duty to do so on the occasion of this accident; that they did not close the door and so swept the pursuer from the platform on to the rails; and, further, that the station was so dark that the pursuer could not see whether the doors were closed or not.

What was the duty of the railway company in this matter, and what they did or omitted to do, is for a jury to determine. Accordingly, my Lords, with the most sincere respect for the opinion of the Court of Session, I am constrained to the view that in this case there is material from which the proper tribunal might conclude that the accident was due to the neglect of the defenders.

I will not express any opinion of my own upon the subject, because I think it is not my province to deal with matters of fact, but the province of the constitutional tribunal.

EARL OF HALSBURY. My Lords, I am entirely of the same opinion. I abstain from expressing any opinion of my own on the point, which is simply a question that the jury will have to determine. It is enough for me to say that in my view there was a case to be properly submitted to a jury, and it was for them to determine it.

LORD ASHBOURNE. My Lords, I agree.

LORD ROBERTSON. My Lords, my opinion is that this appeal must be allowed. I differ with the greatest reluctance from a tribunal so able and experienced in administering this particular jurisdiction, but I think in this instance they have gone too fast.

I must not, however, be supposed in the least degree to hold that because the parties are not agreed as to the facts therefore a case must go to trial. That is a much cruder view than has ever been accepted by the Scottish Courts or by your Lordships in Scottish appeals. Much time and money have been saved by

H. L. (Sc.) 1908 TOAL v. NORTH BRITISH RAILWAY. Lord Robertson.

a more critical view of the case presented by the claimant. When a case comes, as this one did, from the sheriff Court for trial by jury the duty of the Court of Session is to see before a jury is summoned that there is a case to try. This means an ascertainment of the gist or gravamen of the action. The mere fact that in what is probably an unnecessarily detailed averment of circumstances there is a dispute about facts is in no way decisive of the right to go to trial. If the defender can demonstrate that, assuming all the pursuer says, he has no case, then the Court has habitually, and most rightly, ended the litigation. This, however, is a delicate jurisdiction, because it depends in dubious cases on the language, very often obscure, applied to facts very often equivocal.

As I think this case must go to trial, I do not enter into any analysis of the points in the case, for that would merely prejudice the trial. My interposition at all is merely because, in my humble judgment, it has got to be remembered that the Scottish system obliges the pursuer to shew his hand and state his case before he is allowed to go to trial, and thus compels the Court, when invited, to ascertain the value of the case thus stated. In the present instance I think the Court have criticized the statements too severely and nicely.

LORD COLLINS. My Lords, I am of the same opinion.

Ordered, that the order appealed from be reversed, and that the respondents do pay to the appellant his costs in the Court of Session so far as the same relate to the question of relevancy and also the costs incurred by him in respect of this appeal to this House, such last-mentioned costs to be taxed in the manner usual when the appellant sues in forma pauperis.

Lords' Journals, May 26, 1908.

Agents for appellant: *Warlow & Patey, for St. Clair Swanson & Manson, W.S., Edinburgh.*

Agent for respondents: *John Kennedy, W.S., for James Watson, S.S.C., Edinburgh.*

[HOUSE OF LORDS]

WHITEHOUSE . . . . . Appellant; H. L (Sc.) 1908

AND

R. & W. PICKETT and Others . . . . . Respondents. *June* 29

Innkeeper—Limitation of Liability—Goods deposited "expressly for safe Custody"—Innkeepers Liability Act, 1863 (26 & 27 *Vict. c.* 41), *s.* 1.

By the Innkeepers Liability Act, 1863 (26 & 27 Vict. c. 41), s. 1, "No innkeeper shall be liable to make good to any guest of such innkeeper any loss of . . . . goods or property brought to his inn . . . . to a greater amount than the sum of 30*l.* except in the following cases: (1.) Where such goods or property shall have been stolen . . . . through the wilful act, default or neglect of such innkeeper or any servant in his employ. (2.) Where such goods or property shall have been deposited expressly for safe custody with such innkeeper":—

Held (affirming the decision of the extra or Third Division of the Court of Session, Lord Collins dissenting), that to constitute an express deposit for safe custody within sub-s. 2 it must be proved that something was said or done by the guest whose property the goods were that would convey to the innkeeper the fact that the goods were being deposited with him for safe custody; and that the innkeeper received them into his charge with the intention of making himself liable for their safety.

Appeal from the Third or extra Division of the Court of Session, Scotland. (1)

The question raised in the appeal was as to the liability of the respondents R. & W. Pickett, hotel-keepers, Edinburgh, and proprietors of the Imperial Hotel there, for payment to the appellant G. W. Whitehouse, manufacturing jeweller and diamond mounter, of Birmingham, of the value of a bag and its contents, consisting of jewellery samples worth 1800*l.*, which belonged to the appellant and which was lost from the respondents' hotel, Edinburgh, to which it had been taken by a traveller in the employment of the appellant on an occasion when he was residing at the hotel as a guest. It appeared that the traveller, a Mr. Buckley, arrived at the hotel on a Saturday afternoon and handed the bag in question to the "boots," a man called "Sim," who took it without any word being said to the office

(1) (1908) S. C. 218.

H. L. (Sc.) 1908 WHITEHOUSE v. R. & W. PICKETT.

on the first floor of the hotel, which was also used as a bar, and placed it in the same recess as Mr. Buckley's jewellery bags had been placed on previous occasions during the last eighteen years. On Mr. Buckley asking for his bag to take it to his bedroom at 11.30 P.M. it was discovered that the bag had been stolen and a similar one left in its place. The further facts, of which there was no material dispute, are sufficiently given in the opinion of Lord James of Hereford.

The Lord Ordinary (Lord Salvesen) on November 23, 1906, held the respondents liable for the loss, and decreed against them for payment of 1790*l.* 3*s.* 6*d.* But this decision was on November 16, 1907, reversed by the extra or Third Division of the Court of Session, consisting of Lords M'Laren, Pearson, and Ardwall, who held that (1.) the appellant's traveller did not deposit the bag of jewellery with the respondents expressly for safe custody within the meaning of s. 1 of the Innkeepers Liability Act, 1863, and (2.) that it was not proved that the respondents negligently failed to take proper care of the said bag and contents; and gave judgment for the statutory limitation of liability, namely, for the sum of 30*l.* (which had been tendered by the respondents), with costs since such tender to the respondents.

May 21, 22. *Danckwerts*, *K.C.*, and *J. R. Christie* (of the Scottish Bar), for the appellant. The judgment of the Lord Ordinary was correct. There was a printed notice in the vestibule of the hotel that the proprietor of the hotel "will not be responsible for any valuables left in bedrooms, but will take charge of same in office. See extract from Act of Parliament, Vict. 26 & 27, c. 41, in entrance hall"; and the extract in the entrance hall was s. 1 of the Act. Similar notices were in the bedrooms. These notices shewed that it was within the authority of Sim (the "boots") to place the bag in the office, and such deposit of the bag ought to be treated as a "deposit for safe custody" within the meaning of the Innkeepers Liability Act, 1863, s. 1. (1) The word "expressly"

(1) By s. 1 of the Innkeepers Act of 1863 the common law was altered by restricting innkeepers' liability for the property of their guests to

in sub-s. 2 is really synonymous with "unequivocally." There was nothing said in the Act as to the form in which the deposit must be made. Sim had authority to receive the bag, he was the responsible servant of the respondents, and was in the habit of receiving bags containing valuables and depositing them, in the course of his duty, in the office in question. Taking the whole evidence, it must be held that the bag was put in the office from which it was stolen for the purpose of safe custody. There was nothing to shew that the appellant's traveller deposited the bag in the office at his own risk. When everybody is acquainted with the purpose for which the bag was placed in the office, it could not be held to be necessary that on every occasion attention must be called to the fact that the bag was put there for "safe custody." It had been the place used for many years; and the evidence shewed it was the place used by the respondents for placing other valuables.

The custom of many years may be taken to supply the use of the words "deposited expressly for safe custody." These goods were handed over for "safe custody" in the same manner as if they had been given into the innkeeper's own hands: see *M'Pherson* v. *Christie*. (1) As to the evidence, no reasonable explanation has been given of the disappearance of the bag. [They also referred to *Medawar* v. *Grand Hotel Co.* (2) and *O'Connor* v. *Grand International Hotel Co.* (3)]

A. Ure (*S.-G. for Scotland*) and *Munro* (of the Scottish Bar), for the respondents. There was no negligence here within the meaning of the Act. If the appellant's traveller had not happened to meet Sim on his entry, he would have entered the room himself and put his bag where it was put by Sim. All the evidence goes to shew that where the bag was placed was a very safe place. The appellant produced no evidence to shew that the office was left unoccupied, and the respondents cannot

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30*l.* except in two cases, namely: "(1.) Where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ:" "(2.) Where such goods or property shall have been deposited expressly for safe custody with such innkeeper:"

(1) (1841) 3 D. 930.

(2) [1891] 2 Q. B. 11.

(3) [1898] 2 Q. B. (Ir.) 92.

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be liable unless it is proved that they were guilty of inexcusable carelessness. Negligence is a question of degree. If a porter lays a bag down by a desk for a few moments whilst he turns his head, that will not amount to negligence. The burden was on the appellant to prove negligence or to prove that the office, where the bag was placed, was left unoccupied for a considerable time, but he failed to give any such evidence: see *Moes Moliere & Tromp* v. *Leith and Amsterdam Shipping Co.* (1) On the second point, there was no plea that the bag was put into the hands of the innkeeper "expressly for safe custody," and the evidence does not support such an allegation. An innkeeper is only liable if an express contract is made with himself apart from the servants in the hotel. Such a contract cannot be made with the "boots" or the "chambermaid." It must be brought home to the mind of the person who receives the goods that they are "deposited for safe custody"; here nothing was said when the bag was deposited. Even if on the traveller's first visit eighteen years ago he had handed over goods for safe custody, such an express stipulation or warning must be repeated on every subsequent occasion if the innkeeper is to be held liable. The traveller regularly took his bag into and out of the office himself. On the whole evidence there was no express contract and no negligence. [They also cited *Moss* v. *Russell* (2) and *Stevens and Another* v. *Great Western Ry. Co.* (3)]

Danckwerts, K.C., in reply.

The House took time for consideration.

June 29. LORD LOREBURN L.C. My Lords, I shall move your Lordships to dismiss this appeal. The contentions of the appellant were twofold. In the first place he maintained that there had been a deposit expressly for safe custody; in the second place that his property had been lost through the neglect of the innkeepers. It is unnecessary to recapitulate the facts, which have been fully stated in more than one of the opinions already expressed.

I cannot think that the pursuer should succeed on his first

(1) (1867) 5 M. 988. (2) (1884) 1 T. L. R. 13.
(3) (1885) 52 L. T. 324.

contention. Under the statute innkeepers are liable beyond 30*l.* if property has been deposited with them expressly for safe custody.

The word "expressly" is not used without a purpose. It means that an intention by the bailor is not enough. That intention must be brought to the mind of the bailee or his agent in some reasonable and intelligible manner, so that he may, if so minded, insist on the precautions specified in the Act. The pursuer's traveller caused to be placed in the office, without a word spoken, a bag of undeclared contents, which was laid in a corner of the room; and there is nothing more of substance proved in this case on this point except that he had been in the habit of depositing similar property in that or an adjoining room for some years, also without word spoken. The Act meant to secure for the innkeeper, by warning, an opportunity of safeguarding himself when a heavy risk is placed on him. There is no ground for saying he had such a warning here.

As to the second point I see no sufficient evidence. Obviously it was for the pursuer to prove it if he could. He proved that his own traveller and other travellers also were somewhat careless as to the place where bags and parcels were deposited, and perhaps that the innkeeper or his servants were sometimes careless in fastening the doors of the office and the parlour, or in keeping some one constantly there. But no evidence was given to prove how in fact the pursuer's bag was lost, or that it must have been lost through neglect either in leaving doors unlocked or in leaving rooms unwatched. The facts are equally consistent with loss by methods which implied no disregard of reasonable care, and the place chosen for deposit was chosen by the pursuer's own traveller. If it were enough to shew that this property may have been stolen through the innkeeper's neglect, an innkeeper might be liable in every case of unexplained loss. Nor is it enough to prove, if it were proved, that the innkeeper was neglectful in general. He is not liable unless the loss was due to his neglect, which is quite a different thing.

LORD ASHBOURNE. My Lords, there is practically little dispute as to the facts, although there is a difference of opinion as to the

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Lord Ashbourne.

law applicable to the circumstances proved in evidence. This involves a consideration of the Innkeepers Liability Act of 1863, which altered the common law by limiting their liability for the property of their guests to 30*l.* except in two cases—(1.) where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ; (2.) where such goods or property have been deposited expressly for safe custody with such innkeeper.

Taking the second case in the first place, I cannot think that the evidence establishes any such deposit within the meaning of the Act. I do not think that any form of words was needed, but something should be said or done by the guest that would clearly convey to the innkeeper that goods were being deposited with him for safe keeping. Here the guest did not say a word to draw attention to the fact that he was making any deposit whatever. The innkeeper probably never saw the bag at all. The course of dealing would not warrant the effort to spell out any liability. The bag, in my opinion, was left in the office to afford ready access to Mr. Buckley whenever he wanted his bag for his trade purposes, he thinking it as safe and convenient a place as he could find. His removal of it to his bedroom each night demonstrates that he did not think he had fixed the innkeeper with any special liability by leaving it during the day in the office. The respondents cannot eke out a special undertaking by the notice that the proprietors would not be responsible for any valuables left in bedrooms, but would "take charge of same in office," and adding a reference to the statute. This, in my opinion, only invited guests to make deposits for safe custody as contemplated by the Act. Once it is decided that there was no deposit for safe keeping, it is manifest that the duty or obligation was entirely altered. The decision on this point colours the whole case, although, of course, the question of negligence has to be separately considered.

This latter question is somewhat more difficult and needs close examination, but after the best consideration that I can give the case I am unable to arrive at the conclusion that on the actual evidence the respondents are liable. Most probably

the loss was due to the theft of three daring confederates who had been shadowing Buckley, and according to the poster notice of the police had been following him from town to town— London, Manchester, Liverpool, Lancaster, Carlisle, and Glasgow. If Buckley had made an express deposit for safe custody the respondents would be liable, but as he did not do so, and only left his bag in the office in the way described, to be taken such good care of as the course of business in the hotel permitted, and as was extended to their own property, I cannot see any proof of negligence that would render the respondents liable.

It was urged by the appellant that the door from the private sitting-room into the passage was not always locked, and that the door next the bar-room was not always "snibbed" when the bar or sitting-room had, for the moment, no one in attendance. But there can be no doubt, I think, that the usual practice was to have a close attendance and also to keep the door secure. An occasional departure from a settled practice owing to the exigencies of the hotel business would not justify a speculation or guess that this might have led to the loss. The probability that has found most favour on all sides for the theft is that it occurred while the bar was attended by one of the family, whose attention was called away by one of the confederates whilst the others stole the bag. I would not on this speculation hold that the respondents were to be held liable for "wilful act, default, or neglect." There is no affirmative evidence bringing home to the respondents direct negligence from which the loss resulted.

I think that the appellant's argument seeking to hold the respondents liable by the imputation of neglect for the theft from the office is coloured by the fact that the theft was from the office where the bag would have been left if deposited for safe keeping and losing sight of the fact that it was not so deposited.

I think that the judgment appealed from should be affirmed with costs.

Lord James of Hereford. My Lords, I have entertained considerable doubt as to the judgment that should be given in this case, and it is after great hesitation that I have arrived at the conclusion I am about to state.

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Under the provisions of the Innkeepers Act, 1863, the pursuer, in order to recover a greater sum than 30*l*., has to prove (1.) that the lost articles were expressly deposited with the defenders for safe custody, or (2.) that the defenders have been guilty of neglect in relation to the articles. The facts governing the first of these issues are scarcely in dispute, but it is the inference that ought to be drawn from them that has occasioned the doubts I have entertained.

It seems that Buckley, the pursuer's traveller, had for years been in the habit of visiting and staying at the defenders' hotel. On Saturday, February 17, 1906, Buckley paid one of his business visits to Edinburgh and arrived at the defenders' hotel, bringing with him two bags, one containing articles "for personal use," the other jewellery. The porter, a man named Sim, took charge of the bags, taking the first to Buckley's bedroom, and placing the second (containing jewellery) in the corner of the office, behind an ice chest. The place of deposit was substantially the same as that in which Buckley's trade bag had on previous occasions been deposited, and therefore Sim, with the knowledge and in the presence of Buckley, placed it there.

I think it must be taken that Reginald Pickett was aware that the bag was so deposited and that he also knew that it contained jewellery, but nothing passed between him and Buckley on the subject. The whole action of Sim was controlled by his knowledge of the previous habit of dealing with the bag, and that Buckley wished to leave the bag, and Pickett did not object to it being left, in the place I have mentioned.

Within a few hours this bag was found to be missing, probably stolen by means of a well-arranged plan. Upon these facts I come to the conclusion that the bag was, as I have already stated, deposited in a place under the control and supervision of the defenders with the object that it should be in a safer place than if it were in Buckley's bedroom. And I also think that the habit of dealing with the bag, which had grown up, amounted to a permission by the defenders that the bag might be placed in a position more or less under their personal observation and supervision, and which thereby would be a safer place than the bedroom occupied by Buckley. This view of the permission seems

also to have been shared by Buckley. It was reasonable for him to think that the room occupied by the defenders and their servants would be a safer place for his deposit than his empty bedroom.

But there still remains to be considered the question whether the bag was expressly deposited for safe custody with the defenders. In my judgment it was not.

I agree with the opinion expressed in the Court below, that some meaning must be attached to the word "expressly." The Legislature must have meant that if the goods were merely deposited with the innkeeper, liability for loss would not ensue. Such a deposit may be made for other purposes than safe custody, say to be handed to some one applying for the goods. Such a deposit may also possibly be for safe custody, and no liability arises unless some facts exist which satisfy the word "expressly."

My view is that the Legislature intended that before the innkeeper should be liable proof should be given that he had received into his charge goods with the intention of making himself liable for their safety; that he should possess, or at any rate have an opportunity of possessing, knowledge of the nature and value of the goods deposited, so that he might regulate the extent of his control over and care of them with some relation to the liability that would attach to him if the goods were lost.

If this be the proper meaning to be attached to the word "expressly," I have arrived at the conclusion that the jewellery bag was not expressly deposited with the defenders, and that, therefore, they are not liable upon this ground under the exception mentioned in the statute.

But the second exception still has to be dealt with. Were the defenders guilty of negligence in relation to the goods that were lost? When the case was before the Lord Ordinary this was the ground of action mainly insisted upon.

The Lord Ordinary in his judgment says that "the effect of the Act was to throw the onus upon the guest whose property had disappeared in the innkeeper's custody to prove that it had so disappeared through the default or negligence of the innkeeper

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or his servants." Of this statement of the rule of law Lord M'Laren approves, and I see no reason for taking any other view of the innkeeper's liability.

The Lord Ordinary also finds that there is no direct evidence of negligence, but agreed with the pursuer's contention that it must be inferred from the disappearance of the goods coupled with the facts disclosed in the proof which instruct both a laxity in the system adopted by the defenders in storing their customers' property and negligence on the part of those in charge.

There being no direct evidence of negligence, I have difficulty in finding it to be established from the fact of the loss or from the admitted conduct of the defenders. Goods may be stolen notwithstanding that the utmost care is taken of them. Then I seek in vain for particular proof of the alleged negligence. Certain hypotheses are presented as to the way in which the theft might have been committed, but in order to establish negligence it is not enough to surmise the manner of the loss, and then to say opportunity for a theft may have arisen through causes which were not shewn to have any connection with such loss.

Whatever "laxity" existed, it must have been the practice of the inn, which apparently was known to Buckley, and not guarded against by him or complained of. I doubt also whether it is right to say that the goods were "stored" by the defenders. The practice of placing the goods in or near the office was well known and had been pursued to the knowledge of the customer for a long time, but I cannot find that any measure of positive personal supervision was demanded or expected by him.

I wish to observe that if the trial had been before a jury and it had been found by them that the defenders had been guilty of negligence, a grave question would arise whether such a verdict should be set aside, for it may be that some evidence of negligence might be discovered; but this is an appeal against the judgment of the Lord Ordinary upon the whole case, and your Lordships have to review his findings upon the facts as well as the law of the case. With sincere respect

for the authority of that learned judge, I cannot avoid differing from him and agreeing with the judges of the Extra Division.

So it appears to me that on this second ground also the pursuer's case fails, and that therefore the judgment of the Court below is correct, and that the appeal must be dismissed.

In the absence of LORD ROBERTSON his opinion was read by LORD LOREBURN L.C. as follows:—

My Lords, I think the judgment appealed against sound.

By statute, an innkeeper is no longer liable, on the old common law ground, for goods lost in his house, except to the extent of 30*l*. Beyond that, he can only be liable on one or other of the two grounds stated in the statute, that is if the goods have been deposited with the innkeeper expressly for safe custody, or if they have been stolen or lost through the wilful act, default, or neglect of the innkeeper or his servant.

Now, on the first of those alternatives, the appellant has no case at all. Buckley, the traveller, says, in so many words, that he cannot remember ever asking the respondents to take charge of the bag. What he did was simply to put the bag in a place which he thought at once safe and accessible during the day, while, on the other hand, at night he took it to his own bedroom, the bag being, in each case, placed and taken away without reference to the respondents. There is, therefore, no suggestion that this practice was initiated by, or based upon, any original and continuing trust, made and accepted, which should apply to the whole course of Buckley's visits. The thing was done simply on Buckley's estimate of the physical conditions of safety afforded by the place in question, and not on any guarantee of the respondents; as is shewn by his considering his own bedroom, when occupied by himself, still safer than the office. In the one case, as in the other, the respondents were not consulted. They knew, of course, that he put his bag there and that he took it away, in each case at his own hand.

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In the other matter, of neglect, it is necessary to see first what duty is said to be neglected. The hypothesis of the argument is that there was no legal deposit expressly for safe custody, and the duty must, therefore, be one applicable to any goods not deposited for safe custody, of large value or small value. The appellant has no affirmative case on this subject, and the suggestions made are merely hints that this valuable bag ought to have had more care taken of it, which, of course, is simply giving the statute the go-by. When the proved facts are examined, it is plain enough that the bag got exactly the same protection that everything in the office got, including the respondents' own till. Unless, then, there is ground for holding in fact that the till was neglected, there is no ground for holding that this bag was neglected. And ground there is none. It is true that no one sat on the bag any more than on the till; but there is no scintilla of evidence of any desertion of the room, which held both. Nor does the fact of the theft of itself evidence neglect, for it is now plain that three thieves were at work, and it is plausibly suggested that two might engage the occupant of the room in conversation while the third abstracted the bag. These are among the risks which of old fell on the innkeeper, and now do not.

I must frankly say that I think the case a clear one for the respondents.

In the absence of LORD COLLINS his opinion was read by LORD ASHBOURNE as follows:—

My Lords, I am of opinion that this appeal should be allowed and the judgment of the Lord Ordinary restored.

The Innkeepers Act (of the provisions of which the Lord Ordinary finds that sufficient notice was given) cuts down the absolute liability of the innkeeper to his guest for loss or injury to goods, such as those here in question, brought to his inn, to 30*l.*, except (1.) where they have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ; (2.) where such goods or property shall have been deposited expressly for safe custody with such innkeeper.

It has been held that the word "wilful" in the first exception is to be read as applying to "act" only: *Squire* v. *Wheeler*. (1)

The Lord Ordinary, without deciding whether there was an express deposit for safe custody within the second exception, held that the goods in respect of which the action was brought were stolen or lost through the negligence of the defenders or their servants, and awarded the pursuer damages accordingly to the amount of 1790*l*.

I agree that it is not necessary to decide here that there was an "express" deposit for safe custody, though, on the other hand, it would not be a very unreasonable inference to draw, from sixteen years' uniform practice, that the innkeeper accepted an obligation with regard to the bag containing jewellery higher than that under which he received the ordinary luggage of his guest. But it is enough to say that, with regard to it, he was at least in the position of a bailee for reward, and bound as such to a high degree of care. The statute, no doubt in such case, throws the onus of proving negligence on the guest, and there was, in my opinion, evidence of negligence on the part of the innkeeper or his servants which a jury, had the case been tried by one, would have been fully justified in treating as having caused the loss. There was evidence from which a jury might well have inferred that one at least of the defenders was aware that the pursuer's bag had been placed for greater security in the office, and as to one door, at all events, giving access to it, the defenders admitted that the rule was that, when no one was in the office, it should be kept "snibbed." There was evidence that this precaution had not been uniformly adopted on the day in question, and that no special precautions had been taken to make sure that some one should be always on the spot to keep an eye on the things left for safety in the office. The learned judge who tried the case, and heard and saw the witnesses, was at least as well entitled as a jury to draw inferences of fact from evidence which, in my opinion, must have been left to a jury had there been one, and I am certainly not prepared to differ from his conclusions. The argument of the respondents

(1) (1867) 16 L. T. 93.

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Lord Collins.

seemed to me to ignore the high degree of diligence incumbent upon the defenders as bailees for reward, even though there had not been the *express* deposit for safe custody mentioned in the section. It was equally a bailment for reward whether express or implied, and the risk involved and the degree of care required were well understood, but there was a pressure of business in the hotel that night, and less than reasonable care seems to have been adhibited. The fact that they were equally negligent in the custody of the money in their own till, even if relevant in the case of a gratuitous depositary—see *Doorman* v. *Jenkins* (1)—cannot excuse a bailee for reward.

I agree with the Lord Ordinary in his conclusion and his reasons.

Ordered, that the appeal be dismissed with costs.

Lords' Journals, June 29, 1908.

Agents for appellant: *Christopher & Roney, for Gardiner & Macfie, S.S.C., Edinburgh.*

Agents for respondents: *A. & W. Beveridge, for Cuthbert & Marchbank, S.S.C., Edinburgh.*

(1) (1834) 2 A. & E. 256.

[PRIVY COUNCIL.]

BLAKE AND ANOTHER . . . . . DEFENDANTS;

AND

BAYNE AND ANOTHER . . . . . PLAINTIFFS.

J. C.*
1908
March 13, 18;
May 26.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Administration Bond—Duration of Sureties' Liability—Title of Beneficiaries to the Residue—Completion of the Administration.

In a suit in 1904 by the respondents upon an administration bond executed in 1886 and conditioned for the due administration by their eldest sister of the estate of their mother, who had died intestate in 1885, the appellants, as sureties thereto, so far as any misconduct on the part of the administratrix might be proved, pleaded a deed of indemnity duly executed in their favour by herself and the respondents, otherwise that the losses complained of did not result from misconduct as alleged, but from the acts and conduct of the three sisters after the estate had been fully and properly administered and whilst they were absolutely entitled to and in actual enjoyment of the property derived from the intestate:—

Held, on the evidence, overruling the High Court—(1.) that there had been no misconduct by the administratrix and no loss of assets in the course of administration;

(2.) that the deed of indemnity was fully and properly explained to the respondents, to whom the appellants did not stand in any fiduciary relation, that they perfectly understood it, and that no independent advice could have made the matter clearer;

(3.) that after the payment of the intestate's debts the three sisters were entitled to the residue of the estate in equal undivided shares, had consented so to enjoy it, and were jointly responsible for the mode in which it had been dealt with and lost.

Cooper v. *Cooper*, (1874) L. R. 7 H. L. 53, followed.

APPEAL from a decree of the High Court of Australia (September 17, 1906) reversing a decree of Holroyd J. in the Supreme Court of Victoria (December 6, 1905).

The action was brought on April 18, 1904, by the respondents as the next of kin of an intestate to recover 5000*l.* from the appellants as sureties under an administration bond entered into in June, 1886, by them and the administratrix under the

* *Present:* LORD LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

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Administration Act, 1872 (Victoria). A month previously the respondents and their sister, Grace Bayne, the administratrix, executed a deed of indemnity in favour of the appellants against all liability as sureties, and the respondents thereby charged their interest in the estate to cover the indemnity.

The respondents alleged certain breaches of duty by the administratrix which are detailed in the judgment of their Lordships. The defence alleged that there was no other person than the respondents and the administratrix interested in the intestate's estate or the relief sought, and they set up the deed of indemnity as a bar. They further contended that the administratrix had, on the completion of her duties as administratrix, become a trustee of the residuary estate for herself and the respondents with a right and duty to deal with the same in any manner agreed upon by her and the respondents; that the alleged breaches of trust, if committed, were not breaches of any duty attaching to the administratrix in that capacity, and therefore not a breach of the condition of the bond; that, so far as the administratrix did the acts complained of, she acted either at the express request or with the knowledge and acquiescence of the respondents and with their consent, and as a trustee for and on behalf of them and herself, as the respondents always well knew.

The respondents replied that if the deed of indemnity was executed by them the same was executed at the request of the appellants at the time when the appellants were acting as the solicitors and legal advisers of the administratrix and of the respondents, and that the respondents had no independent advice and were ignorant of the effect of the deed; that the deed, if executed by them, was so executed upon misrepresentations by the appellants; and, further, that the same was contrary to public policy and void.

Holroyd J. was of opinion that the deed of indemnity was a complete answer to the action, and ordered that judgment be entered for the appellants with costs. He had previously referred to the Full Court the point whether the deed of indemnity was void on the ground of public policy. The opinion of the Full Court was in effect that, notwithstanding the fact that sureties to an administration bond are prescribed by statute for the

protection of the estate, there is no reason why the beneficiaries should not, by a deed executed before or contemporaneously with the bond and not communicated to the Court, release the sureties from their obligation in respect of claims by the beneficiaries and indemnify the sureties in respect of claims by other persons.

The High Court decreed in favour of the respondents. It declared that the deed of indemnity was void as against persons beneficially interested in the estate of the intestate, and that the plaintiffs, as representing such persons other than the administratrix, were entitled to recover from the defendants such sum, not exceeding 5000*l.*, as represented the amount by which the shares of such persons in distribution were diminished by reason of the failure of the administratrix to duly administer the said estate, but so that no sum should be recoverable in respect of any diminution of the share of any such person by reason of any failure in which such person concurred and acquiesced. It held that the deed of indemnity was executed by the respondents at a time when some fiduciary relation, although possibly not that of solicitor and client, existed between them and the appellants, and that the respondents had no independent advice with reference thereto and were ignorant of the effect thereof. It cited *Willis* v. *Barron* (1); *Rhodes* v. *Bate* (2); *Wright* v. *Carter*. (3) It further held that the deed was bad because the appellants, being solicitors for the administratrix, could not make a bargain with the beneficiaries for a charge on the estate; that even as against the administratrix the appellants could not by contract acquire any rights more extensive than the implied rights of sureties. It had been contended on behalf of the appellants that the bond and the deed were one transaction, and that the appellants would not have joined in the bond if the deed had not been executed, and accordingly that the respondents could not have the benefit of the bond and repudiate the deed, but this contention was overruled. It had also been contended on behalf of the appellants that the administratrix had changed her character and become a trustee, and that the respondents acquiesced in their shares

(1) [1902] A. C. 271; [1900] 2 Ch. 121; [1899] 2 Ch. 578.

(2) (1865) 36 Ch. D. 145.

(3) [1903] 1 Ch. 27.

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remaining in her hands as trustee, and, further, that they had acquiesced in and consented to the acts of which they complained, but these contentions were overruled. The Court also expressed the view that the deed was void on the ground that there was involved in the transaction a bargain or understanding that the same should not be communicated to the Court on the application for grant of letters of administration, and was therefore a fraud upon the Court.

Upjohn, K.C., and *Alfred Dunham*, for the appellants, contended that the High Court had no jurisdiction to entertain an appeal from the decision of a single judge of a State Supreme Court. The Commonwealth Constitution Act, s. 73, provided that the High Court should have jurisdiction to hear and determine appeals from all judgments, decrees, orders, and sentences of the Supreme Court of any State. It was submitted that on its true construction this meant the Full Court, and that there was no intention to give an alternative appeal from a single judge either to the full Supreme Court of the State or to the High Court. But it had been held, it was contended erroneously, in the case of *Parkin* v. *James* (1), that an appeal from a single judge lay direct to the High Court.

[LORD LOREBURN L.C. At the date of the Constitution Act what were the relations between this Board and the Supreme Court?]

They were as defined by 7 & 8 Vict. c. 69, s. 1, and by Victoria Act No. 1142 of 1890, ss. 3, 9, 18, which define the Supreme Court; and see ss. 36, 54, 55, and 231. Sects. 36 and 55 must be read together. Reference was made to *Garden Gully United Quartz Mining Co.* v. *McLister* (2), where an appeal was entertained from the Victorian judge in Equity, and to *Henty* v. *Reg.* (3), a case decided since the Act of 1890.

[Their Lordships held that the High Court had the jurisdiction which had been exercised in this case.]

It was then contended that, so far as the administratrix did the acts complained of, it was after she had discharged all claims

(1) (1905) 2 C. L. R. 315.
(2) (1875) 1 App. Cas. 39.
(3) [1896] A. C. 567; S. C. 11 V. L. R. 517.

of creditors against the estate and had become a trustee of the residue for herself and the respondents. They were therefore not breaches of the condition of the bond, for administration had been completed and the three sisters' title to their distributive shares had accrued, the eldest acting as trustee and with the knowledge and consent of the respondents. With regard to the deed of indemnity, no attempt to avoid it had been made for seventeen years. The appellants were not solicitors to the respondents, nor did they stand in any fiduciary relation to them. It was fully explained to and understood by the respondents and was not voidable. The bond and deed constituted one transaction and must stand or fall together. With regard to the suggestion that the deed was tainted with fraud, there was no evidence of any bargain or understanding in regard to it, nor had the appellants or their witnesses been cross-examined on the point. The High Court ought not to have overruled under those circumstances the finding of the judge who heard the evidence and saw the witnesses.

E. A. Jennings, for the respondents, contended that the evidence shewed that the appellants had been solicitors for the intestate, and that the three sisters, being absolutely ignorant of business and legal matters, consulted them as their family solicitors. On their advice Grace Bayne took out letters, and the appellants on their own suggestion became sureties for the administration bond, which under ss. 26 and 27 of the Victorian Administration Act, 1872, she was bound to execute. It was admitted that the three sisters had no independent or legal advice when they executed the deed of indemnity. They did not understand it and believed it to be a mere formality. Prior to action the bond was assigned to the respondents by order of Court under s. 17 of the Administration Probate Act, 1890, which re-enacted s. 28 of the Act of 1872. The appellants were not entitled to rely on the deed of indemnity and were liable under the bond for the breaches of trust and devastavit which had been committed. Holroyd J. found that there was no valid or operative deed of agreement proved under which Grace Bayne should hold as trustee or the three sisters hold by a title independent of the administratrix.

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[LORD LOREBURN L.C. Can you protract the administration for seventeen years so as to retain the liability of the sureties in such circumstances as these?]

It was the appellants' fault as solicitors that the estate had not been formally wound up and partitioned, and until that was done the power and responsibility of the administratrix continued. The breaches of trust were committed with the advice and assistance of the appellants as solicitors, and they could not escape liability on any distinction to be drawn between Grace Bayne's position as administratrix and her position as trustee. Reference was made to *In re Lockey*. (1)

Counsel for the appellants were not heard in reply.

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May 26.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from a decision of the High Court of Australia, reversing a judgment of the Supreme Court of Victoria pronounced by Holroyd J. after a trial which lasted twelve days and a reference to the Full Court on a point of law.

The action was brought by the respondents Lila Elizabeth Bayne (who is sometimes called Eliza Bayne) and Mary Bayne to recover 5000*l.* alleged to be due on a bond entered into by Grace Bayne as administratrix and the appellants Blake and Riggall (who were solicitors and in partnership) as sureties for her. The bond was conditioned for the due administration of the estate of Grace Bayne, widow, who died on June 10, 1885, intestate.

The case of the plaintiffs was that there had been misconduct on the part of Grace Bayne as administratrix, and loss of assets in consequence, and that the sureties were liable for this loss to the extent of the penalty in the bond.

Holroyd J. dismissed the action with costs. The High Court held the sureties liable, condemned them in costs, and directed inquiries.

Grace Bayne, the administratrix, and her sisters Mary and Lila Elizabeth were the only children and sole next of kin of

(1) (1844) 1 Ph. 509.

the intestate. At the date of their mother's death Grace and Mary, who were twins, were twenty-nine years of age. Lila Elizabeth was twenty-six.

Grace Bayne, the intestate, was the widow of a man in the building trade, who had died three or four years before her, leaving a good deal of house property in Melbourne. With the exception of one lot of trifling value, the property was in mortgage, but it was worth about 10,000*l.* over and above all incumbrances. Mrs. Bayne apparently succeeded to the property under her husband's will. But no particulars of her title are given. She managed the property herself, let it, and collected the rents. She attended regularly at the office of Messrs. Blake & Riggall, who were the mortgagees' solicitors, to pay the interest on the mortgages as her husband had done. Besides, Messrs. Blake & Riggall seem to have acted for her professionally on some occasions. There is nothing to indicate that the business in which they were employed for her was anything more than ordinary business connected with the management of house property in the occupation of monthly or weekly tenants. There is absolutely nothing tending to shew or to suggest that Mrs. Bayne was a friend, or even an acquaintance, of either Blake or Riggall, or ever treated them as her confidential advisers or consulted them or either of them in reference to the settlement or disposition of her property or in connection with any provision for her children.

On the death of Mrs. Bayne, Grace, the eldest daughter, called at Messrs. Blake & Riggall's office to inquire whether they had made a will for her mother. She was told they had not. Mr. Blake explained what had to be done in order to obtain administration, and then he handed the matter over to his principal clerk, a Mr. Tomlins. On July 23, 1885, a grant of administration was obtained in favour of Grace Bayne, the eldest daughter. There were very few debts and they were all paid "immediately" after Mrs. Bayne's death. "The creditors when my mother died," says Grace Bayne, "were paid off at once." The mortgage debts already referred to—600*l.* on one of the houses and 4700*l.* on the rest—seem to have been debts contracted by Mr. Bayne, probably on account of advances to him in his business. There is nothing

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to shew that Mrs. Bayne made these debts her own, or was liable for them except in a representative character. The security seems to have been ample, and the mortgagees appear to have been perfectly satisfied with their position.

The estate was valued at 10,000*l.* or thereabouts. Besides furniture and effects in the house occupied by Mrs. Bayne and her daughters it consisted of the house property already mentioned and moneys in the hands of the Melbourne Permanent Building Society, who acted as bankers for their customers. They supplied the administratrix with what she required in the way of cash. Questioned as to how she got money from them before letters of administration were issued, she "always got money," she replied, when she "went for it."

Although the grant of administration was dated July 23, 1885, the letters of administration were not issued until nearly a year afterwards. The delay was occasioned, it seems, principally by the inability of the administratrix to procure sureties. She had no friends who would accept the position. So she applied again to Blake & Riggall. She was told that there were guarantee companies who undertook that sort of business and were accepted as sureties by the Court. Mr. Tomlins was instructed to ascertain on what terms the guarantee of such a company could be obtained. These companies, of course, as Griffith C.J. observes, "derive their income from the sums or premiums paid to them as a consideration for entering into the contracts of suretyship." Three companies were applied to. The lowest terms were those offered by the Union Trustee Company of Australia. That company required a commission of 100*l.*, being 2 per cent. on the penalty of the bond, together with an indemnity by the next of kin. No company, it seems, "was willing to undertake the business without such an indemnity." So it is sworn, and there is no contradiction on the point. Grace, or one of her sisters, thought the commission rather high. Then, at Mr. Tomlins' suggestion, Messrs. Blake & Riggall were offered as sureties at a reduced commission of 75*l.* on the same terms as regards indemnity as those demanded by the Union Trustee Company. Grace on behalf of herself and her sisters accepted the proposal. A deed of indemnity was prepared and engrossed and handed to

Grace for the consideration of her sisters and herself. Before it was executed Mr. Tomlins, by Mr. Blake's direction, made an appointment for the purpose of reading it over and explaining it. He called upon the Misses Bayne at their house on May 20, 1886, in the evening. He found the sisters at home, the dining-room table cleared and the deed upon it. The deed was short and simple. It stated accurately the legal position and rights of the three sisters. Mr. Tomlins read it over aloud and explained it carefully. He was there about three-quarters of an hour. It was purely a business interview. The three sisters all listened attentively. Though Grace did most of the talking, both the younger sisters seemed very intelligent—so Mr. Tomlins judged from the part they took in the conversation. Then the deed was executed. But it was left with Grace and her sisters because it was suggested by Mr. Tomlins that perhaps under the circumstances the Court would accept the two younger sisters as sureties, and so the commission might be saved. Mr Tomlins was to consult counsel on this point. He did so, but the opinion was adverse. A few days afterwards Grace brought the deed back to Messrs. Blake & Riggall's office. They executed the bond on June 11, 1886, and thereupon the letters of administration were issued.

"The evidence of Mr. Tomlins," Holroyd J. observes, "left no doubt on my mind that the effect of the deed of indemnity was fully and clearly explained to them" (the plaintiffs) "and that they perfectly understood what* [a] risk they were incurring when they signed it. Any suspicion of their having been persuaded into signing it either by Grace Bayne or her solicitors was entirely dissipated by their conduct. In truth they were as eager as their sister was to get rid of the interference of sureties and could not or would not realize that their interests might need safeguarding when placed in their sister's hands."

It is important to note the position of the estate when the deed of indemnity was signed. All the debts had been paid. There was no liability outstanding. The mother's estate was clear. The three sisters were equally entitled to it and every part of it in the actual state and condition in which it was. Without the consent of her two sisters it was neither the duty

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nor the right of the administratrix to convert the estate into money for the purpose of division or investment. The two younger sisters must have known perfectly well at the time that they were entitled to an equal share with their elder sister. In fact, they admit it. But they desired, as the learned judge says, that the elder sister should take the place of their mother, and that she "should have the sole and absolute control of the property without themselves inquiring of what it consisted or what was being done with it." They were living "together in perfect harmony." The younger sisters had implicit confidence in the good sense and business capacity of the elder sister. The elder sister, as she says, knew that the property was theirs as much as hers. For a while the arrangement worked very well. Grace managed everything just as their mother had done in her lifetime, and everything was perfectly satisfactory.

In 1889, some four years later, the three sisters went to England and stayed there two years or so. The trip cost them about 2200*l*. The money, or the greater part of it, was drawn from the building society. The manager of the society and his agent were employed to collect the rents during their absence. On their return in 1891 they stopped for two or three months at the Grand Hotel, and there they fell in with a Mr. Baylee, who is described as "an agent." He spoke to Grace Bayne about a corner block which abutted on their property. It belonged to a building society called the Premier. It seems that at this time, though Grace was not aware of the state of things in the Colony, from which she had been absent so long, the value of property in Melbourne was going down. "The beginning of 1891," it appears, "was the end of the land boom in Melbourne." Probably the building society and their agent were not unwilling to secure a purchaser before things got worse. However that may be, Grace was tempted to buy this corner lot and agreed to purchase it for 4900*l*. That was the beginning of all the trouble and the origin of the mischief which has given rise to this litigation. For, as Mary Bayne said, "everything was right" up to the time they came back from England, and they were "quite satisfied" with what Grace did up till then. Grace was asked at the trial

how she thought she was going to pay for this new purchase, as there was already a mortgage for 4700*l.* outstanding. She had said before, "I often ask myself what put it into my mind to buy the property." All she could say in answer to the question addressed to her was, "I do not know. I did not understand why I did it at all. I cannot understand why I wanted to buy the corner block at all. It altered all my plans. I cannot give any explanation why I leapt into this speculation."

To pay for this purchase and to clear off the existing mortgage it became necessary to mortgage the greater part of the real estate which the three sisters derived from their mother. The money was obtained from Messrs. Smith & Tyler, who were transferees of the mortgage for 4700*l.* On September 2, 1891, Grace Bayne, with the consent in writing of her two sisters, who are described in the memorandum of consent as being together with Grace "the only next of kin of . . . . Grace Bayne deceased, entitled by law to share her property," executed a mortgage in favour of Smith & Tyler on the property included in the old mortgage and the property bought from the Premier Building Society for the purpose of securing the sum of 10,000*l.* and interest. And the mortgage was duly registered.

The next thing that Grace Bayne did after her return from England was to buy a residence for her sisters and herself. A house was found which they all liked very much. The sum asked was 3500*l.* The price was thought too high, and the negotiation dropped. After some little time the owner came forward and offered to take 3000*l.*, and Grace agreed to buy it for that sum. For this purchase, too, Grace and her sisters could only pay by mortgaging it, together with a house called "Avaland," which was not comprised in Smith & Tyler's mortgage and was then unincumbered. On October 1, 1891, Grace, with the consent in writing of her two sisters, executed a mortgage in favour of one James Landale on Avaland and on their intended residence, which they called "Alcazar," for the purpose of securing the sum of 3000*l.* and interest. And that mortgage also was duly registered.

The result of these speculations on the part of the three sisters was disastrous.

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The value of property in the Colony continued to fall. Banks failed. There came a period of extreme depression. The mortgagees pressed for their money, and at last foreclosed. And the whole of the property comprised in the two mortgages of 1891 was lost.

The Melbourne Permanent Building Society had gone into liquidation in the bad times, and there was a loss of about 700*l.* in respect of the moneys in the hands of the society at the time of its failure.

The sisters, having thus lost their means of livelihood, consulted more than one legal adviser. Ultimately an action, which was apparently a friendly action, was brought by the two younger sisters against Grace. Then they procured the administration bond to be assigned to them, and thereupon the present action was launched.

The acts of misconduct alleged to have been committed by Grace Bayne in the administration of her mother's estate were these:—

(1.) Payment of 75*l.* as commission to Blake & Riggall out of the intestate's estate.

(2.) Leaving moneys, part of the intestate's estate, in the hands of the Melbourne Permanent Building Society.

(3.) The two mortgages of 1891, and the transactions of which they formed part.

The defence to the action was twofold. The defendants maintained:—

(1.) That the payment of the commission was necessary and not improper, and that the losses complained of did not result from misconduct on the part of Grace Bayne in her capacity of administratrix, but from the acts and conduct of the persons who were absolutely entitled to the property derived from the intestate and in actual enjoyment of it, after the estate had been fully and properly administered.

(2.) That if and so far as there was any misconduct on the part of Grace Bayne in her capacity as administratrix, the deed of indemnity was a full and complete answer to the claim.

It seems to their Lordships that the defendants must succeed on either of these grounds of defence.

Holroyd J. did not deal with the first because he thought that such a defence could not be set up in the absence of a formal deed. In this respect their Lordships think that the learned judge was in error. There seems to be no reason why three persons of full age and ordinary intelligence, being entitled to property in equal undivided shares, should not commit the management of that property to one of their own number with authority to deal with it, whether the authority so conferred be qualified or absolute. And there seems to be no reason why such an arrangement, if otherwise unobjectionable, should not be established by proof of conduct and by admissions made in Court just as well as by a solemn deed duly signed, sealed, and delivered.

The case on the part of the plaintiffs seems to be founded in a great measure upon a view of the interest of a next of kin in an intestate's estate which was advanced in the case of *Cooper* v. *Cooper* (1) and rejected by the House of Lords. "It was very much pressed upon your Lordships," said Lord Cairns L.C. in that case, "that the interest of a next of kin in the estate of an intestate is an undefined and intangible interest, that it is a right merely to have the estate converted into money, and to receive a payment in money after the debts and expenses are discharged. My Lords, no doubt the right of a next of kin is a right which can only be asserted by calling upon the administrator to perform his duty, and the performance of the duty of the administrator may require the conversion of the estate into money for the purpose of paying debts and legacies [*quære* expenses?]. But I apprehend that the rule of law or the rule laid down by the statute which requires the conversion of an intestate's estate into money is a rule introduced simply for the benefit of creditors and for the facility of division. For the benefit of creditors and for the facility of division among the next of kin the estate is to be turned into money, but as regards substantial proprietorship the right of the next of kin remains clear to every item forming the personal estate of the intestate, subject only to those paramount claims of creditors."

The opinion expressed by Lord Cairns and the other noble and

(1) L. R. 7 H. L. 53.

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learned Lords in *Cooper* v. *Cooper* (1) goes a long way to dispose of the whole case set up on behalf of the plaintiffs. Subject to the payment of debts, the whole estate was the absolute property of the three next of kin. The furniture and effects were theirs; the money was theirs; the houses were theirs. The debts were paid immediately after the death. If the next of kin chose to leave the whole estate just as it was in the hands of the eldest sister and under her absolute control (as the evidence shews, and as Holroyd J. finds, it was their desire and intention to do), there was no reason why effect should not be given to their wishes. As long as they lived together there was no reason for dividing the furniture. There was no reason for dividing the money. It was applied honestly and equally for their common benefit. There was even less reason for dividing the house property. It was managed by Grace, as they wished it to be, and by her alone. Moreover, it seems from a bill of costs put in evidence that the title was never transferred into the name of the administratrix until the property was dealt with by the mortgages of 1891, and then the consent of the two younger sisters was required by the mortgagees and by the Registrar of Titles. In the ordinary course of things it would not have been possible for the administratrix to have dealt with it alone and without the consent of her two younger sisters. There is evidence that all the sisters were strongly against selling the houses which had been built by their father. A partition of the property and readjustment of the mortgages would have been profitable to the solicitors, but to no one else. It would have made no difference so long as the absolute control of the property was in the hands of the eldest sister, and they would have it so.

The specific acts alleged as breaches of duty may be dealt with shortly.

As regards the commission of 75*l.*, it is clear that the letters of administration could not have been issued without the aid of persons who would only give their assistance as a matter of business and for payment. Blake & Riggall consented to act for a smaller commission than that which guarantee companies required. It was not suggested that any other persons would

(1) L. R. 7 H. L. 53.

have done what was required more cheaply. It was not disputed that the commission would have been properly payable out of the estate if a guarantee company had been employed. It is therefore difficult to see what objection there can be, so far as the plaintiffs are concerned, to the commission paid to Blake & Riggall coming out of the estate. But, in fact, in the circumstances of the present case it is immaterial whether the payment be treated as coming out of the estate or out of the shares of the next of kin. The plaintiffs knew about the payment and assented to it.

It is still more difficult to understand the charge of misconduct in leaving moneys in the hands of the building society. The learned Chief Justice says it was an "unauthorized investment." It is difficult to see what the meaning of that expression is. As the three sisters were absolute owners of the money, and were of mature age, they were perfectly free to deal with it as they pleased. There could be no question of authorized or unauthorized investment. In point of fact, the money in the hands of the building society at the date of the intestate's death—amounting in all to 2188*l.* 0*s.* 8*d.*—was applied for the common benefit of the three sisters. It was evidently all drawn out long before the failure of the society. No accounts were in evidence on the appeal to this Board, but it appears that Grace Bayne drew out money to pay the intestate's debts and to discharge a mortgage debt of 600*l.* (probably a charge on the house called Avaland), besides 210*l.*, 1000*l.*, and 660*l.*, or 1870*l.* in all, for the expenses attending the visit to England.

The money in the hands of the society at the time of the failure amounted to 1232*l.*, and the evidence is that that sum did not represent moneys deposited by the intestate in her lifetime.

There remains the charge in respect of the mortgages of 1891. It is perfectly clear that the two purchases made by Grace in 1891 after the visit to England, and the mortgages created for the purpose of paying for them, had nothing to do with the administration of the intestate's estate. They were speculations on the part of Grace Bayne, carried out with the consent and concurrence of her younger sisters. The result would have been just the same if the real estate derived from the intestate had

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stood in the joint names of the three sisters as proprietors. But there are two things connected with this part of the case which it would not be right to pass over in silence, and which shew that it is difficult, if not impossible, to place any reliance upon any statement made by Grace or by her sisters without some corroboration. Grace Bayne swore in one part of her evidence that she was advised by Mr. Riggall to buy the corner lot which was bought from the Premier Building Society. And Grace and her sisters came prepared to swear, and did swear, that two documents marked Exhibit 8 and Exhibit 9, purporting to be signed by Mary and Lila Elizabeth in the presence of a Mr. Savage, who was then the accountant in Blake & Riggall's office, and on which the Registrar of Titles acted as evidencing the consent of the younger sisters to the mortgages of 1891, were both of them forgeries. Mr. Riggall was called, and absolutely denied the story which Grace told about the advice which she said he gave her. The judge believed him, and not the lady. So far from advising Grace to make that foolish purchase, when she came to Mr. Riggall in order to get the means to pay for it he tried to dissuade her. He remonstrated with her. "Do you think it wise," he said, "for you and your sisters, who have enough to live on, and have your properties mortgaged now, to go and mortgage them still more to buy another place?" "She replied," says Mr. Riggall, "that she had gone into the matter thoroughly, and that the property that was being bought would add very greatly to the value of their own." Mr. Riggall, of course, had nothing more to say. He declares, on oath, that it was an entire untruth to say he advised it. "My advice," he said, "was not asked in any way in connection with the purchase. Miss Bayne did not take very kindly to the suggestion that I made. I volunteered the advice, and I got a little snubbed." Later on Grace was told that there was a flaw in the title, and that she could get out of the bargain if she chose. Her answer was, "I have begun it, and I will go on with it." She was, as she says, "self-reliant," and needed "restraint." But Blake & Riggall were not her trustees or her guardians.

The charge of forgery by which the plaintiffs endeavoured to bolster up their case is more serious and equally baseless. Mr.

Savage was called. He declared that the documents by which the plaintiffs testified their consent to the two mortgages of 1891 were executed by them in his presence after they had been duly read over. Holroyd J. believed Mr. Savage, and seems to have thought this part of the plaintiffs' story absurd. This is what he says about it: "Now comes the most extraordinary part of this case. Miss Grace Bayne denies positively that Savage saw her two sisters sign Exhibit 8, and is equally positive that the signatures Mary Bayne and Eliza Bayne to Exhibits 8 and 9 respectively are not in the writing of either of her sisters. Miss Lila has sworn that the signature Eliza Bayne to Exhibit 8 and to Exhibit 9 are neither of them hers, and that the signature Mary Bayne to each is not that of her sister Mary. Miss Mary has sworn, as to both Exhibits 8 and 9, that the signature Eliza Bayne is not her sister's Lila, and that she doubts about her own, but is positive that she never signed a document before Mr. Savage in Blake & Riggall's office or anywhere else. I must say that the imputations of forgery and perjury which are conveyed by the plaintiffs' repudiation of their signatures seems to me wildly improbable, and when the evidence is sifted, rests upon no other ground than want of recollection. They receive no countenance from the comparison of handwriting. I believe that the plaintiffs did voluntarily sign the Exhibits 8 and 9."

Holroyd J. thought that the deed of indemnity was a defence to the action. He found that the deed had been fully explained to the plaintiffs and "that there was really no evidence of Messrs. Blake & Riggall having personally advised either of the plaintiffs, or having in any other way acted as their solicitor." But he felt some difficulty as to whether the deed was not void on the ground of public policy, and he reserved that question for the determination of the Full Court.

The judgment of the Full Court was given by Madden C.J.

"We cannot," said the Chief Justice of Victoria, "see anything in this transaction contrary to the spirit of any provision which is enacted in the interests of the whole public or in fact to anything which even indirectly or collaterally is enjoined to be observed by this Court in these matters."

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After this ruling judgment was pronounced dismissing the action with costs.

It is not necessary to say anything more on the point reserved for the Full Court. It was raised again in the High Court, and dealt with at some length there. O'Connor J. agreed with the opinion of Madden C.J., nor did the Chief Justice dissent from it in substance. The learned Chief Justice, however, thought "it was an implied term of the arrangement that the indemnity should not be brought to the notice of the Court." O'Connor J. did not agree in that view; nor do their Lordships.

In reversing the judgment of Holroyd J. the High Court differed not so much on questions of fact as on the proper inference to be drawn from the circumstances of the case and the position of the parties.

They thought that Messrs. Blake & Riggall were the family solicitors of the Misses Bayne. They thought that Blake & Riggall were to all intents and purposes the solicitors of the plaintiffs; that in reliance upon them as their solicitors the plaintiffs executed the deed of indemnity, and that, having regard to the fiduciary relation, which in their opinion subsisted between Blake & Riggall and the plaintiffs, the deed could not be supported in the absence of independent advice. Even if Blake & Riggall were not to be considered the solicitors of the plaintiffs, the result, they thought, would be the same, because Grace Bayne was instrumental in procuring the deed and Blake & Riggall were certainly her solicitors. They therefore thought that there was "a taint of fraud" about the deed of indemnity, and that it must be declared void; and, holding that a breach of trust had been committed in paying commission to Blake & Riggall and in leaving part of the estate in the hands of the building society, and not being satisfied that the plaintiffs understood what they were doing in giving their consent to the mortgages of 1891, they discharged the order of Holroyd J. and directed further inquiries.

Their Lordships are unable to agree with the conclusion at which the High Court arrived, or with the reasons on which that conclusion is founded. They do not think that Messrs. Blake &

Riggall can be regarded as the family solicitors of the Misses Bayne in the sense in which that expression is ordinarily or properly used. Messrs. Blake & Riggall were certainly not solicitors of the plaintiffs, nor did they, in their Lordships' opinion, stand in any confidential relation towards them. It is not suggested by the plaintiffs in the evidence they gave. Mary Bayne says: "I never personally consulted any of the firm or any of their subordinate officers or clerks about anything whatever. . . . . To my knowledge my sister Lila never consulted Blake & Riggall on any occasion."

Their Lordships agree with Holroyd J. in thinking that the deed of indemnity was fully and properly explained to the plaintiffs, that they perfectly understood it, and that no independent advice could have made the matter clearer or have been of any advantage whatever. The law applicable to cases where benefits are obtained by persons standing in a fiduciary relation to the donor is well settled. The principles applicable to those cases are clear. But each case must depend upon its own circumstances; and their Lordships are unable to see an analogy between the present case and the cases cited in the judgment of the learned Chief Justice.

Having regard to an expression which occurs in the judgment of the learned Chief Justice, and which possibly may be misunderstood, their Lordships think it right to say that in their opinion no "taint of fraud" attaches to the conduct of Messrs. Blake & Riggall. Whether they were morally justified in taking so large a fee for doing that which in their opinion at the time involved neither risk nor trouble is not a question with which their Lordships are concerned. It is, however, only fair to them to observe that they do not seem to have been particularly anxious to get the job. Apparently it was undertaken rather for the convenience of their client, when other means failed, than for their own pecuniary advantage. And clearly they shewed no disposition to make costs out of their client or out of the administration of the estate.

Their Lordships are of opinion that the conclusion at which Holroyd J. arrived was right. They will therefore humbly advise His Majesty that the appeal ought to be allowed, the

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judgment of the High Court discharged with costs, and the judgment of Holroyd J. restored.

The respondents will pay the costs of the appeal.

Solicitors for appellants: *Murray, Hutchins, Stirling & Murray.*
Solicitors for respondents: *E. F. & H. Landon.*

Referred to. PERERA *v.* PEIRIS. [1949] A. C. 1

[PRIVY COUNCIL.]

J. C.* 1908 *March* 31; *April* 1, 2; *June* 3.

MACINTOSH AND ANOTHER . . . . . PLAINTIFFS;

AND

DUN AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Libel—Trade Protection Society—Communications to Subscribers not privileged —Privilege founded on the General Interest of Society.

A verdict for damages having been obtained in an action for libel against the respondents, who carried on the business of a trade protection society, that is, of obtaining information with reference to the commercial standing and position of persons in New South Wales and elsewhere, and in communicating such information confidentially to subscribers to the agency in response to their specific and confidential inquiries, the Full Court of New South Wales ordered a new trial, and the High Court of Australia entered judgment for the respondents.

Held, that the orders of both Courts must be reversed. The occasion was privileged if the communication injurious to the plaintiffs' character was made in the general interest of society and from sense of duty; not so, if it was made from motives of self-interest by those who, for the convenience of a class, trade for profit in the characters of other persons, and who offer for sale information which, however cautiously and discreetly sought, may have been improperly obtained.

APPEAL by special leave, limited to the question of privilege, from a judgment of the High Court (May 7, 1906) which ordered that a verdict should be entered for the respondents, thereby affirming a judgment of the Full Court of New South Wales (December 8, 1905) so far as it ordered that a verdict and

* *Present:* LORD LOREBURN L.C., LORD ASHBOURNE, LORD MACNAGHTEN, LORD ROBERTSON, LORD ATKINSON, and LORD COLLINS.

judgment entered for the appellants at the trial of their action in respect of the publication of two libels upon them should be set aside and reversing it so far as it directed a new trial. The question decided was whether the occasion of the publication of the two libels, which were of and concerning the appellants in relation to their business, was privileged. They were contained in two reports in writing, dated December 10, 1903, and November 13, 1903, published to a firm of Holdsworth, Macpherson & Co.

The case for the appellants was that the said libels consisted partly of the repetition of alleged rumours and partly of defamatory statements put forward as being within the respondents' own knowledge, and the general purport and effect of them was that the appellants were persons with whom it was not wise to do business in the ordinary way, or upon the ordinary terms of credit; that they had concealed an important change in the constitution of their firm in order to give their business a fictitious appearance of financial stability; that the appellant James Macintosh was commonly and correctly reported to be living beyond his means, and to possess habits and tastes which were likely to bring the appellants and their business rapidly into a state of insolvency; that the business was grossly mismanaged; and that the appellants were persons without personal resources or assets, except book debts and a stock that was greatly depreciated, and were heavily in debt and unable to meet their current business liabilities and engagements, which included a heavy overdraft on their account with their bankers, and were struggling with severe financial difficulties which would probably end in disaster.

At the close of the appellants' case before Cohen J. it was submitted that the appellants should be nonsuited on the ground that the occasion of the publication by the respondents to the said Holdsworth, Macpherson & Co. of the two reports in question was privileged and that there was no evidence of express malice to go to the jury. The respondents did not deny the fact of publication, nor that the said two reports contained defamatory matter of and concerning the appellants in relation to their said business. The trial judge ruled that the occasion

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was not privileged and so directed the jury. But with a view to a possible appeal against his ruling on the question of privilege the learned judge left to the jury two questions on the subject of malice:

1. Did the defendants in distributing the reports act from a sense of duty or from some indirect or improper motive?

2. Did the defendants distribute the reports recklessly, not caring whether they were true or false?

In reply the jury found that the respondents acted from a sense of duty to their own subscribers, and that they exercised care as far as possible.

Cohen J. ruled that the plea of privilege was bad, in accordance with *Foley* v. *Hall.* (1)

Pring J., delivering the judgment of the Full Court on a motion by the respondents to set aside the verdict, ruled that the case relied on did not apply and that the occasion was privileged. He declined to set aside the verdict, but, on the ground of certain errors in the conduct of the trial, ordered a new one.

The High Court held that the occasion was privileged and that judgment should be entered for the respondents.

The reasons were stated in the judgment of Griffiths C.J. as follows:—

The law of New South Wales on this subject is the same as the law of England. I will commence what I have to say on the subject by reading what is statute law in Queensland, Western Australia, and Tasmania, which is, I think, a short statement of what was also the common law. Sect. 377 of the Queensland Criminal Code, 1899, provides: "It is a lawful excuse for the publication of defamatory matter . . . . (4.) if the publication is made in good faith in answer to an inquiry made of the person making the publication relating to some subject as to which the person by whom or on whose behalf the inquiry is made has, or is believed, on reasonable grounds, by the person making the publication to have, an interest in knowing the truth."

Then as to the meaning of "good faith" this is the provision:

(1) (1891) 12 N. S. W. L. R. 175.

"For the purposes of this section a publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter; if the manner and extent of the publication does not exceed what is reasonably sufficient for the occasion; and if the person by whom it is made is not actuated by ill-will to the person defamed, or by any other improper motive, and does not believe the defamatory matter to be untrue."

That rule is perhaps a little harder on the publisher of a libel than the common law. For even if the publication did exceed what was reasonably sufficient for the occasion, still, under the common law, it is a question entirely for the jury to say whether it is malicious or not. I will refer to one or two of the more recent English cases on the subject of privilege. I quote first from the judgment of Lindley L.J. in *Stuart* v. *Bell* (1): "What, then, are privileged occasions, what are the circumstances which must exist in order to rebut the implication of malice which arises from the utterance of untrue defamatory language? Without referring to such matters as reports of what occurs in Parliament, Courts of justice, or public meetings, which have no bearing on the present case, I can find no better answer to this question than that given by Parke B. in *Toogood* v. *Spyring* (2) and by Erle C.J. in *Whiteley* v. *Adams*. (3) In *Toogood* v. *Spyring* (2) Parke B., in speaking of the publication of statements false in fact and injurious to the character of another, said (4): 'The law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not

(1) [1891] 2 Q. B. 341, at p. 346.
(2) (1834) 1 C. M. & R. 181.
(3) (1863) 15 C. B. (N.S.) 392, at p. 418.
(4) 1 C. M. & R. 181, at p. 193.

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restricted the right to make them within any narrow limits.' This passage has been frequently quoted, and always with approval."

Then, quoting from the judgment of Erle C.J. in *Whiteley* v. *Adams* (1), he said (2): "The rule has been laid down in the Court of Exchequer, and again, lately, in the Court of Queen's Bench, that if the circumstances bring the judge to the opinion that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it, then, if the words pass in the honest belief on the part of the persons writing or uttering them, he is bound to hold that the action fails."

In the case of *Jenoure* v. *Delmege* (3), decided in the same year by the Privy Council, Lord Macnaghten, in delivering the judgment of the Committee, said: "The privilege would be worth very little if a person making a communication on a privileged occasion were to be required, in the first place, and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true. In such a case bona fides is always to be presumed."

It was suggested that whether the defendant is or is not acting under a sense of duty is material on the question whether the occasion is privileged. It was pointed out in *Stuart* v. *Bell* (4) that these questions had nothing to do with one another. Lindley L.J. remarked, on the question whether the defendants acted under a sense of duty, "But this, though important on the question of malice, is not, I think, relevant to the question whether the occasion was or was not privileged."

The question in the present case is whether the occasion falls within the rules so laid down. Pring J., in delivering the judgment of the Supreme Court, quoted the language of Woodruffe J. in the Court of Appeal of the State of New York in the case of *Ormsby* v. *Douglass*. (5) That was an action brought against people who conducted a mercantile agency similar to that conducted by the present defendants. As Pring J. said (6),

(1) 15 C. B. (N.S.) 392, at p. 418.
(2) [1891] 2 Q. B. 341, at p. 347.
(3) [1891] A. C. 73, at p. 79.
(4) [1891] 2 Q. B. 341, at p. 349.
(5) (1868) 37 N. Y. 477.
(6) (1905) 5 S. R. (N.S.W.) 708, at p. 718.

"Mr. Justice Woodruffe makes use of language which must appeal to the common sense of every one." That is the language of Pring J., and I entirely agree with him. He says: "Upon the same general principle merchants have an interest in knowing, and have a right to know, the character of their dealers and of those who propose to deal with them, and of those upon whose standing and responsibility they, in course of their business, have occasion to rely. As a necessary consequence they may make inquiries of other merchants or of any person who may have information, and if such person or other person, in good faith, communicates the information which he has, or thinks he has, the communication is privileged."

On those authorities I have no difficulty whatever in coming to the conclusion that the occasion was privileged.

Dickens, *K.C.*, and *J. A. Simon*, *K.C.*, for the appellants, contended that the order of the High Court directing that judgment be entered for the respondents should be reversed and that judgment should be entered for the appellants. The trial judge was right in ruling that the occasion of the publication of the said libels was not privileged. No evidence was called on behalf of the respondents to justify the libels complained of. The case made was that the occasion of publishing them was privileged, and that there was no evidence of malice. The ground was that the respondents were a trade protection agency who for reward provided information to such of their subscribers as applied for it with regard to the financial position of other traders. But a contract to supply information for reward cannot of itself create a duty to supply it; nor can it create such a common interest in the subject-matter of the information as would justify its publication. It was contended that there was no duty cast on the respondents to supply it, and that their doing so was purely voluntary and based upon no duty recognized by law. It was voluntary, for they sought subscribers, competing with other agencies to get them. The following cases were referred to where information had been volunteered:— *Harrison* v. *Bush* (1); *Toogood* v. *Spyring* (2); *Hebditch* v.

(1) (1855) 5 E. & B. 344, 348. (2) 1 C. M. & R. 181.

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MacIlwaine (1); *Waller* v. *Loch* (2); *Robshaw* v. *Smith* (3); *Stuart* v. *Bell* (4); *King* v. *Watts* (5); *Coxhead* v. *Richards* (6); *Bennett* v. *Deacon*. (7) It is, however, immaterial whether the information was volunteered. There must be a duty to supply it, and only accurate information will be protected: see *Fleming* v. *Newton* (8); *Annaly* v. *Trade Auxiliary Co.* (9); *Williams* v. *Smith* (10); *Searles* v. *Scarlett* (11); *Reis* v. *Perry* (12); *Saunders* v. *Seyd and Kelly's Credit Index Co.* (13); *Cohen* v. *Merchants' and Traders' Association, Ld.* (14); *M'Nally* v. *Oldham* (15); *Pullman* v. *Hill & Co.* (16); *Foley* v. *Hall.* (17)

Sir R. Finlay, K.C., Wise, K.C. (of New South Wales), and *Frank Gover*, for the respondents, contended that the occasions were privileged. The information was given confidentially in response to specific and confidential inquiry made by a subscriber to the respondents' agency. The true principle is that circumstances rebut the inference of malice. The circumstances here were that an important failure had taken place in Sydney and there was general uneasiness and distrust. The business of trade inquiry is beneficial, and it is important, not merely to individuals, but to the community, to know to whom credit may be given. It is for the common convenience and welfare that merchants should have the means of obtaining information as to the financial standing and credit of those with whom they are dealing. Answers given confidentially, honestly, and in the course of business to inquiries should not subject the person or firm giving them to an action for defamation. These reports were given in that way for their exclusive use and benefit to a firm which made inquiries, and the duty to make them arose to a limited class of persons (subscribers) under a contract which was lawful and for the benefit of trade and commerce. Reference

(1) [1894] 2 Q. B. 54.
(2) (1881) 7 Q. B. D. 619.
(3) (1878) 38 L. T. 423.
(4) [1891] 2 Q. B. 341, 348.
(5) (1838) 8 C. & P. 614.
(6) (1846) 2 C. B. 569.
(7) (1846) 2 C. B. 628.
(8) (1848) 1 H. L. C. 363.
(9) 26 Ir. C. L. R. 394.
(10) (1888) 22 Q. B. D. 134.
(11) [1892] 2 Q. B. 57.
(12) (1895) 64 L. J. (Q.B.) 566.
(13) (1896) 75 L. T. (N.S.) 193.
(14) (1900) 21 N. S. W. L. R. 241.
(15) (1863) 16 Ir. C. L. R. 298.
(16) [1891] 1 Q. B. 524.
(17) 12 N. S. W. L. R. 175.

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was made to *Amann* v. *Damm* (1); *Stuart* v. *Bell* (2); *Davies* v. *Snead* (3); *Fleming* v. *Newton* (4); *Williams* v. *Smith* (5), which was a good deal questioned in *Searles* v. *Scarlett* (6); *Reis* v. *Perry* (7); *Saunders* v. *Seyd and Kelly's Credit Index Co.* (8); *Jenoure* v. *Delmege.* (9) The New South Wales Act 22 of 1901, ss. 4—8, says what amounts to a defence to an action of this nature: *Ormesby* v. *Douglass* (10); *Sunderlin* v. *Bradstreet* (11); *Erber* v. *Dun* (12); *Locke* v. *Bradstreet* (13); *King* v. *Patterson* (14); *Douglass* v. *Daisley* (15); *Robinson* v. *Dun* (16); *Todd* v. *Dun* (17); *Foley* v. *Hall.* (18) There can be no inference of malice where the inquirer has an interest in getting the information: *Bromage* v. *Prosser* (19); *Usill* v. *Hales.* (20) These societies are more necessary in new countries than in England.

Dickens, K.C., replied.

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June 3.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from a decision of the High Court of Australia pronounced on cross-appeals from two orders of the Full Court of New South Wales.

The action was an action for libel. It was tried before Cohen J. and a jury. The plaintiffs obtained a verdict for 800*l.* The Full Court set the verdict aside, but directed a new trial. The High Court entered judgment for the defendants.

The question, and the only question on the present appeal, is whether the occasion on which the libels were published was or was not a privileged occasion.

The plaintiffs are wholesale and retail ironmongers in Sydney. The defendants (as their acting manager in Sydney stated in an

(1) (1860) 8 C. B. (N.S.) 597.
(2) [1891] 2 Q. B. 341.
(3) (1870) L. R. 5 Q. B. 608, 611.
(4) 1 H. L. C. 363.
(5) 22 Q. B. D. 134.
(6) [1892] 2 Q. B. 57.
(7) 64 L. J. (Q.B.) 566.
(8) 75 L. T. (N.S.) 193.
(9) [1891] A. C. 73, 79.
(10) 37 N. Y. 477, 484.
(11) (1871) 46 N. Y. 188.
(12) (1882) 12 Fed. Rep. 526.
(13) (1885) 22 Fed. Rep. 771.
(14) (1887) 60 Amer. Rep. 622.
(15) (1902) 114 Fed. Rep. 628.
(16) (1897) 24 Upper Can. App. Cas. 287.
(17) (1888) 15 Upper Can. App. Cas. 85.
(18) 12 N. S. W. L. R. 175.
(19) (1825) 4 B. & C. 247, 258.
(20) (1878) 3 C. P. D. 319.

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affidavit filed in the action) carry on the business of a trade protective society "in almost all parts of the civilized world" under the name of "The Mercantile Agency." That business, as the acting manager explained, "consists in obtaining information with reference to the commercial standing and position of persons" in the State of New South Wales "and elsewhere and in communicating such information confidentially to subscribers to the agency in response to specific and confidential inquiry on their part." He stated further that all requests for information directed to the agency by their subscribers are in the following form:—

"Subscriber's Ticket.
"The Mercantile Agency.
"R. G. Dunn and Co.
"Established 1841.

"Give us in confidence and for our exclusive use and benefit in our business, viz., that of aiding us to determine the propriety of giving credit, whatever information you have, respecting the standing, responsibility, &c., of—

"Name .....
"Business.....
"Town .....
"Street address .....
"State .....

"Subscribers to sign the above themselves.

.....

"Subscriber
per.....

"Sydney,
"190 .
"No. ."

The law with regard to the publication of information injurious to the character of another is well settled. The difficulty lies in applying the law to the circumstances of the particular case under consideration. In *Toogood* v. *Spyring* (1) Parke B., delivering the judgment of the Court of Exchequer, says: "The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private

(1) 1 C. M. & R. 181, at p. 193.

duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits."

That passage, which, as Lindley L.J. observes (1), is frequently cited, and "always with approval," not only defines the occasion that protects a communication otherwise actionable, but enunciates the principle on which the protection is founded. The underlying principle is "the common convenience and welfare of society"—not the convenience of individuals or the convenience of a class, but, to use the words of Erle C.J. in *Whiteley* v. *Adams* (2), "the general interest of society."

Communications injurious to the character of another may be made in answer to inquiry or may be volunteered. If the communication be made in the legitimate defence of a person's own interest, or plainly under a sense of duty such as would be "recognized by English people of ordinary intelligence and moral principle" (3), to borrow again the language of Lindley L.J., it cannot matter whether it is volunteered or brought out in answer to an inquiry. But in cases which are near the line, and in cases which may give rise to a difference of opinion, the circumstance that the information is volunteered is an element for consideration certainly not without some importance.

In deference, therefore, to the views of the learned judges of the High Court, the first question would seem to be, under which category does the communication now in question properly fall? No doubt there was a specific request. In response to that request the communication was made. That much is clear. But it is equally clear that the defendants set themselves in motion and formulated and invited the request in answer to which the information complained of was produced. The

(1) [1891] 2 Q. B. 346. (2) 15 C. B. (N.S.) 392, at p. 418.
(3) [1891] 2 Q. B. 350.

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defendants, in fact, hold themselves out as collectors of information about other people which they are ready to sell to their customers. It cannot matter whether the customer deals across the counter, so to speak, just as and when the occasion arises, or whether he enjoys the privilege of being enrolled as a subscriber and pays the fee in advance.

If, then, the proprietors of the Mercantile Agency are to be regarded as volunteers in supplying the information which they profess to have at their disposal, what is their motive? Is it a sense of duty? Certainly not. It is a matter of business with them. Their motive is self-interest. They carry on their trade, just as other traders do, in the hope and expectation of making a profit.

Then comes the real question: Is it in the interest of the community, is it for the welfare of society, that the protection which the law throws around communications made in legitimate self-defence, or from a bona fide sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of other people? The trade is a peculiar one; still there seems to be much competition for it; and in this trade, as in most others, success will attend the exertions of those who give the best value for money and probe most thoroughly the matter placed in their hands. There is no reason to suppose that the defendants generally have acted otherwise than cautiously and discreetly. But information such as that which they offer for sale may be obtained in many ways, not all of them deserving of commendation. It may be extorted from the person whose character is in question through fear of misrepresentation or misconstruction if he remains silent. It may be gathered from gossip. It may be picked up from discharged servants. It may be betrayed by disloyal employees. It is only right that those who engage in such a business, touching so closely very dangerous ground, should take the consequences if they overstep the law.

It may not be out of place to recall the striking language of Knight Bruce V.-C. (1) in reference to a somewhat similar

(1) 1 De G. & S. 28.

subject. The question before him was the propriety of enforcing disclosure of communications between a client and his legal advisers. "The discovery and vindication and establishment of truth," his Honour says, "are main purposes certainly of the existence of Courts of justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. . . . . Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much." And then he points out that the meanness and the mischief of prying into things which are regarded as confidential, with all the attending consequences, are "too great a price to pay for truth itself."

It seems to their Lordships, following out this train of thought, that, however convenient it may be to a trader to know all the secrets of his neighbour's position, his "standing," his "responsibility," and whatever else may be comprehended under the expression "et cetera," yet, even so, accuracy of information may be bought too dearly—at least for the good of society in general.

It is admitted that in this country there is no authority directly in point. There are direct authorities in the United States in favour of the conclusion at which the High Court has arrived. American authorities are, no doubt, entitled to the highest respect. But this is a question that must be decided by English law. In the dearth of English authority it seems to their Lordships that recourse must be had to the principle on which the law in England on this subject is founded. With the utmost deference to the learned judges of the High Court, their Lordships are of opinion that the decision under appeal is not in accordance with that principle.

Their Lordships will therefore humbly advise His Majesty that the orders appealed from should be discharged and the judgments of the Full Court reversed, with costs in both Courts, including the costs of the cross-appeals, and that any costs already paid

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by the appellants to the respondents should be repaid by the latter.

The respondents will pay the costs of the appeal.

Solicitors for appellants: *Spyer & Sons.*

Solicitors for respondents: *C. W. Dommett & Son.*

[PRIVY COUNCIL.]

J. C.* 1908 *April* 2; *May* 21.

SHRAGER AND ANOTHER . . . . . APPELLANTS;

AND

MARCH . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS—SETTLEMENT OF SINGAPORE.

English Bankruptcy Act, 1883, *s.* 47—*Straits Settlements Bankruptcy Ordinance of* 1888, *s.* 45—*Construction—Conveyance by Settlor to himself as Trustee.*

Under s. 47 of the Bankruptcy Act, 1883, in order that a settlement may be valid the property comprised therein must pass from the settlor to the trustee:—

Held, that this provision is complied with where a settlor has altered his position from that of beneficial owner to that of a trustee for his wife and children, though ultimately and on their default for himself.

APPEAL from a judgment of the Supreme Court of Appeal, reversing a judgment of Fisher J., which had dismissed the respondent's motion in bankruptcy for a declaration that a voluntary settlement dated November 2, 1901, made by the appellant Cecil Shrager, a bankrupt, was void under the provisions of s. 47 of the English Bankruptcy Act, 1883, as against the respondent, the trustee in the bankruptcy. By the decision of the Court of Appeal it was declared that the settlement was void as against the trustee in bankruptcy.

The question decided was whether under the circumstances stated in their Lordships' judgment the appellants had proved

* *Present:* LORD MACNAGHTEN, LORD ROBERTSON, LORD ATKINSON, and LORD COLLINS.

that the interest of the settlor Cecil Shrager in the property comprised in the settlement had, according to its terms as stated in the judgment, passed to the trustee on the execution thereof within the meaning of s. 47 of the Bankruptcy Act, 1883 (reproduced in the Straits Settlements by s. 45 of the Bankruptcy Ordinance of 1888).

Sect. 47 of the Act of 1883 is as follows:—

"(1.) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall if the settlor becomes bankrupt within two years after the date of the settlement be void against the trustee in the bankruptcy, and shall if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof."

The Chief Justice's judgment was as follows:—

"It is unfortunate that with the exception of the case of *In re Lowndes* (1) there appears to have been no judicial interpretation of this provision. At all events none was brought to our notice, but in my view the interest referred to is the legal interest, for the beneficial interest would not pass to the trustee at all.

"The settlor could not convey the legal estate to himself, nor has he purported to do so. All that he has purported to do is to declare that 'he the settlor his executors or administrators or other the trustees or trustee for the time being of these presents will henceforth stand seised of or entitled to all the hereditaments specified in the schedule hereto upon the trusts hereinafter declared.' That is to say, he has adopted the second mode of the two mentioned by Sir George Jessel in the case of *Richards*

(1) (1887) 18 Q. B. D. 677.

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v. *Delbridge* (1), by which a man may transfer his property without valuable consideration; but that mode does not transfer the legal title. And the object of the section is, it appears to me, to prevent a settlor remaining in any way in control of the property: of course the settlement would have been perfectly good had not bankruptcy supervened within the time limited by the section; as it has supervened the settlement is void against the trustee."

C. E. Jenkins, K.C., and *Hansell*, for the appellants, contended that on the true construction of the deed of settlement the settlor's interest in the property therein comprised had passed to the trustee thereof within the meaning of s. 47. It was a valid declaration of trust, and passed the interest of the settlor from himself as settlor to himself as trustee. Reference was made to *In re Lowndes* (2); *In re Hughes*. (3)

H. Reed, K.C., and *Chaytor*, for the respondent, contended that the entire interest of the settlor did not pass under the deed as contemplated by s. 47. The beneficial enjoyment of the property purported to pass by the deed, but was in fact retained by the settlor. It was not proved that the settlement was a real operative document. Reference was made to *In re Hillman*. (4)

C. E. Jenkins, K.C., replied.

1908 *May* 21.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from an order of the Supreme Court of the Straits Settlements declaring a post-nuptial settlement made by one Cecil Shrager, a bankrupt, void as against the trustee in bankruptcy.

Cecil Shrager and four brothers of his, who carried on business at Singapore, Calcutta, and elsewhere under the style of Shrager Brothers, were adjudicated bankrupts in the High Court of Justice in England on November 29, 1905. The respondent March was appointed trustee in the bankruptcy.

The settlement in question was made by deed dated November 2, 1901. By this deed Cecil Shrager declared that he or other

(1) (1874) L. R. 18 Eq. 11.
(2) 18 Q. B. D. 677.
(3) [1893] 1 Q. B. 595.
(4) (1879) 10 Ch. D. 622.

the trustees or trustee thereof would stand seised of certain real property in Singapore upon trust for sale and hold the proceeds when invested as therein directed upon trust to pay the income to the settlor's wife, the appellant Hermina Shrager, during her life for her separate use, without power of anticipation, and after her death to the settlor, if he should survive her, during the residue of his life. Then there were trusts in favour of the issue of the marriage, with an ultimate trust in default of issue for the settlor. Until sale the rents and profits of the property were to be held and applied on the same trusts as the income of the proceeds of sale when invested.

It is not disputed that at the date of the execution of this settlement Cecil Shrager was solvent and able to pay his debts without the aid of the property comprised in the settlement, and that the settlement was made in good faith.

It was, however, contended by the trustee in bankruptcy that, under s. 47 of the Bankruptcy Act, 1883, the settlement was void as against him, on the ground that the property comprised in the settlement did not, on the execution thereof, pass from the settlor to the trustee of the settlement.

In the Supreme Court, sitting as a Court of first instance, Fisher J. held that, although there was no actual transfer of the legal title, the declaration of trust was sufficient to pass the interest of the settlor within the meaning of the enactment.

On appeal it was held by the Supreme Court, consisting of Hyndman Jones C.J. and Thornton J., sitting as the appellate Court in bankruptcy, that the settlement of November 2, 1901, having been made by the bankrupt Cecil Shrager within ten years of his bankruptcy, was void as against the trustee in bankruptcy.

Both the learned judges expressed an opinion to the effect that the interest of the settlor referred to in s. 47 of the Act of 1883 must be the legal estate of the settlor, "for his equitable or beneficial interest," as Thornton J. observed, "could not, under any circumstances, pass to the trustee, but to the cestuis que trustent."

Their Lordships are of opinion that the view of Fisher J. is to be preferred. The words which have given rise to the

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difficulty are not to be found in the Bankruptcy Act of 1869. They occur for the first time in the Act of 1883. They are certainly not well chosen. But the meaning is clear. The settlor must on the execution of the settlement divest himself of all interest in the property settled. Their Lordships think that the alteration in the position of the settlor from that of beneficial owner to that of mere trustee, so far as his wife and issue were concerned, was a sufficient compliance with the exigency of the new provision contained in s. 47 of the Act of 1883.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed and the order of Fisher J. restored, and that the respondent should pay the costs of the present appellants in the Supreme Court.

The respondent will pay the costs of this appeal.

Solicitors for appellants: *Thorowgood, Tabor & Hardcastle.*
Solicitors for respondent: *Rehders & Higgs.*

[HOUSE OF LORDS]

H. L. (E.) 1908 *July* 3.

SS. KNUTSFORD, LIMITED . . . . . APPELLANTS;

AND

TILLMANNS & CO.. . . . . RESPONDENTS.

Shipping—Bill of Lading—Construction—"Inaccessible on account of Ice"—"Unsafe in consequence of War, Disturbance or any other Cause"—Ejusdem Generis Principle.

Goods were shipped on board a steamship for a foreign port under bills of lading providing that if a port should be inaccessible on account of ice, blockade or interdict, or if entry and discharge at a port should be deemed by the master unsafe in consequence of war, disturbance or any other cause, it should be competent for the master to discharge the goods on the ice or at some other safe port or place:—

Held that, upon the true construction of the bills of lading, "inaccessible" and "unsafe" must be read reasonably and with a view to all the circumstances; that the words "or any other cause" must be read as being ejusdem generis with war or disturbance; and that as a matter

of fact the master was not justified under all the circumstances in this case in failing to deliver the goods at the port for which they were shipped merely because that port was at the moment of their arrival inaccessible on account of ice for three days only.

Decision of the Court of Appeal, [1908] 2 K. B. 385, affirmed.

THE questions raised by this appeal are set forth fully in the report of the decision of Channell J. (1), and again in the report of the decision of the Court of Appeal. They are also stated sufficiently for this report in the judgments of Lord Loreburn L.C. and Lord Dunedin.

The reports of the arguments in both Courts below cover all the points raised in this House.

July 2, 3. *Atkin, K.C.*, and *Lewis Noad*, for the appellants.
J. A. Hamilton, K.C., and *Adair Roche*, for the respondents.
Atkin, K.C., in reply.

LORD LOREBURN L.C. My Lords, I am clearly of opinion that this judgment ought to be affirmed. This vessel went from Middlesbrough to Japan to deliver most of her cargo, and then sailed for Vladivostock. When she arrived within forty miles of Vladivostock she found she could not get into the port by reason of ice. There was some danger to her propeller, it is said, from ice. There was also some fear—rather a vague fear—of submarine mines, and there was some danger, if the wind changed, from a lee shore. The vessel tried for three days in vain to get through the ice and then went back to Nagasaki, and, by order telegraphed from England, there discharged her cargo. The next day after her turning back the ice cleared off, the access was safe, and other vessels entered. This vessel went back to Nagasaki, and it is claimed that she was entitled to do so.

Is this conduct justifiable within the terms of the fourth clause of the bill of lading? Was the port of Vladivostock "inaccessible" on account of ice? At the moment, and for two or three days, undoubtedly it was; but the meaning of this bill of lading, in my opinion, is that the port must be

(1) [1908] 1 K. B. 185.

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inaccessible in a commercial sense so that a ship cannot enter without inordinate delay. There is no ground for saying that a delay of three days on a journey so long could be regarded as inordinate delay.

The next point taken was that by the bill of lading she might discharge at some other safe port, "should the entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance or any other cause." My Lords, that also does not mean unsafe at the moment, but it means unsafe for a period which would involve inordinate delay. The master never decided that the port was unsafe in that sense, and never could have decided anything of the kind.

Then, my Lords, it was said there was an "error of judgment" of the master within the second clause of the bill of lading. I do not see that the master ever exercised his judgment within the meaning of that clause. He thought (no doubt acting in good faith) that he could go back, and he went back. He simply broke his contract, interpreting it erroneously.

The other point—namely, that one of the bills of lading was signed by Messrs. Watts instead of the captain—to my mind is destitute of validity in law and even more destitute of merits. If the captain had been directed to sign it he would have been obliged to sign it. The point is merely technical—that the proper signature was not there. I am not satisfied that the captain did not know perfectly well of this signature and sanction it.

Accordingly I am of opinion that this appeal should be dismissed with costs.

LORD MACNAGHTEN. My Lords, I agree with my noble and learned friend on the woolsack on all the three points. One of them I think ought not to have been raised, and about that I will not say anything more. With regard to the other two, after the very full and able arguments we have had I think that the judgments of Channell J. and the Court of Appeal are quite right.

I do not think that the port of Vladivostock was inaccessible within the meaning of the documents, although the captain could not make his way there through the ice for three days.

I do not think he was justified in giving up the attempt after so short a trial, considering that he had plenty of coal on board. I do not think that, having regard to the fact of the whole of the freight having been paid in advance, he was justified in landing the goods at Nagasaki. While the goods were still on board he learned that the port of Vladivostock was accessible, and I think he was bound to prosecute his voyage to the destination mentioned in the bills of lading.

As regards the last point, I think the rule of ejusdem generis applies as laid down in *Thames and Mersey Marine Insurance Company* v. *Hamilton*(1), and I prefer to take the rule on a point of that sort from a case which did deal with bills of lading and shipping documents rather than from cases that dealt with real property and settlements.

On the whole I think the appeal ought to be dismissed.

Lord James of Hereford. My Lords, the main question in this case is entirely, I think, one of fact, and I concur in the judgment which has just been delivered by my noble and learned friend Lord Macnaghten on that point.

My Lords, it seems to me that the master when he gave up the attempt to enter Vladivostock for Japan and there delivered his cargo was acting in the interests of the shipowners so as to get rid of the burden of that cargo, and not in the interests of the charterers. He did not wait the time, which a person acting in the interests of the charterers would have waited, near the mouth of the river to see whether the ice did or did not pass away. If he had done so for a reasonable time none of this litigation would have arisen.

Lord Dunedin. My Lords, the appellants were bound by at least three of the bills of lading to deliver this cargo at Vladivostock. Admittedly they did not do so, but delivered it at Nagasaki. They must therefore be liable in damages for the failure unless they can shew that they are excused in respect of any of the exceptions in the bill.

Their principal defence was based on the fourth clause, the

(1) (1887) 12 App. Cas. 484, at pp. 490, 501.

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Lord Dunedin.

terms of which I need not again read to your Lordships. They plead the protection of both members of the clause. As to the first, have they shewn that de facto Vladivostock was inaccessible on account of ice? It is obvious that inaccessibility must be judged of reasonably. Here the practical inaccessibility lasted but three days, and though the captain may have been right, in view of the danger of his anchorage under the lee of Askold Island, to give up the attempt to enter Vladivostock when he did, I see no reason why he should not have renewed his attempt when the weather conditions changed as they did on the very next day.

As to the second part of the clause, I have come after consideration to agree with the learned judges of the Court of Appeal in thinking that "any other cause" must be limited there to causes ejusdem generis as war and disturbance, and cannot apply to ice, which is especially dealt with in the first portion. But even were that not so, I think that the same considerations as to the facts which prevent the appellants sheltering themselves under the first portion apply here also; in other words, I should hold that the condition of unsafeness must at least endure until the delivery at the alternative port has been effected.

The other clause appealed to was the general enumeration in clause 2, in which, inter alia, figures "error in judgment of the master, &c., ... whether in navigating the ship or otherwise." I can only say that this seems to me to have no application. The non-delivery of the goods at Vladivostock was not due to an error in judgment of the captain. The proper application of the clause is sufficiently indicated by the words "in navigating the ship or otherwise." It seems to me fantastic to extend it to the idea of a captain forming a wrong legal opinion on the meaning of a clause in the bill of lading and then proceeding to act upon it.

The only point remaining is whether the appellants are bound in respect of the fourth bill of lading. I am content with the judgment of Channell J. I do not think that any new and dangerous liability, as was urged, is being imposed on owners, because it must be clearly understood that this was a bill of lading which the master could rightly have been called on to

sign. Had the bill of lading contained stipulations of such an extraordinary character that the master might have refused to sign, then that defence would have been equally open upon the question of whether the signature of the charterers bound the owners.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 3, 1908.

Solicitors: *William A. Crump & Son; Botterell & Roche.*

[HOUSE OF LORDS.]

ATTORNEY-GENERAL . . . . . APPELLANT;

AND

JEFFERYS . . . . . RESPONDENT.

Will—Construction—Executors—No Next of Kin—Residue undisposed of—Beneficial Title of Executors—Equal pecuniary Legacies to all—Unequal specific Legacies to some—Presumption of Intention.

The rule established by the old law as to executors being trustees of undisposed-of residue must not be extended beyond the cases which established it.

By a will in 1881 (to which the Executors Act, 1830, did not apply) the testator appointed three executors, and gave to each an equal pecuniary legacy and to two of them specific legacies of unequal value. There being no gift of residue and no next of kin, the Crown claimed the residuary estate:—

Held that, on the true construction of this will, the peculiar circumstances raised no presumption that the testator intended to make the executors merely trustees, and that they were entitled to the residuary estate for their own benefit.

Decision of the Court of Appeal, reported as *In re Glukman, Attorney-General* v. *Jefferys*, [1908] 1 Ch. 552, affirmed.

In 1881 Leone Glukman made his will, appointing three executors, Jefferys, Cardenosa and Grece, and bequeathing 1000*l.* to each of them. Besides legacies to several other

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people, he bequeathed all his foreign decorations to Cardenosa and a ring and a watch to Grece. There was no gift of residue.

After the testator's death search was made for next of kin, but none of the 166 claimants made a title. The Crown having claimed the residuary personal estate, Swinfen Eady J. held that the respondent, who was the surviving executor, was a trustee for the Crown. (1) This decision was reversed by the Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Buckley L.JJ.), who held that upon the true construction of the will, and in the events which happened, the respondent and Grece were absolutely entitled to the residuary estate, Cardenosa having died long before. Hence the present appeal.

Sir W. S. Robson, A.-G., and *Sargant*, for the appellant. The prima facie presumption that in the absence of any express gift of residue the appointment of an executor or executors carries with it the beneficial interest in the residue is liable to be rebutted by any sufficient contrary indication. It is long-established and settled law that a sufficient rebutting indication in such a case is to be found in a gift to a single executor of a pecuniary legacy or to each of two or more executors of equal pecuniary legacies, because any such gift would be meaningless and absurd if the executor or executors already take the residue beneficially by virtue of their appointment. If in the present case the original appointment of the executors were held to vest the residuary personal estate in them beneficially, the Court would be attributing to the testator the absurdity of subsequently subtracting from the original gift and giving over again to each of the original donees an equal aliquot part of the original gift. The decision of the Court of Appeal introduces an exception founded on no sufficient ground to an established and reasonable canon of construction in this class of case. A pecuniary legacy to a single executor is enough to rebut the presumption: *Farrington* v. *Knightly* (2), where a number of cases are cited to the effect that, wherever on the face of the will Courts of Equity have seen sufficient evidence that a testator did not intend the executors to take the surplus, they have turned the executors

(1) [1907] 1 Ch. 171. (2) (1719) 1 P. Wms. 543; see note on p. 549.

into trustees for the next of kin: see also *Southcot* v. *Watson* (1); *Nourse* v. *Finch* (2), *Hornsby* v. *Finch* (3), and *Holford* v. *Wood* (4), where a specific bequest was held sufficient for the purpose. In *Saltmarsh* v. *Barrett* (5) there were legacies to the executors followed by a bequest to them of the whole of the estate and effects charged with the payment of certain legacies and all costs and expenses. These did not exhaust the residue, and the surplus was held by Sir John Romilly M.R. and Turner L.J.—Knight Bruce L.J. dissenting—to be held on trust for the next of kin. In *Foster* v. *Munt* (6) there were legacies of 10*l.* apiece for the executors and gifts to the children and grandchildren, but no disposition of the surplus. The executors were held to be trustees for the children and grandchildren. In *Muckleston* v. *Brown* (7) there were equal legacies to the two executors, and they were held trustees of the residue for the next of kin. Plumer M.R., in *Ommanney* v. *Butcher* (8), thus expresses the rule: "There never has been a case in which executors have been permitted to take the residue for their own use and benefit when equal legacies have been given to them, and given to them as executors." The Court will not adopt a construction which is in effect meaningless where pecuniary legacies are given to executors, if the executors are to take the whole. [They also referred to *Robertson* v. *Broadbent.* (9) The other cases referred to in the Court of Appeal were also cited.]

Sir Robert Finlay, K.C., *Cassel, K.C.*, and *Ward Coldridge*, for the respondent, were not heard.

Earl of Halsbury. My Lords, whether this critical construction of a man's will and the establishment of certain canons of construction whereby whenever similar cases occur you are bound to adopt the view which has presented itself to the mind of learned judges in early times be wise or not, I think this principle is right—that after a system of construction has

(1) (1745) 3 Atk. 226.
(2) (1791) 1 Ves. Jun. 344.
(3) (1793) 2 Ves. Jun. 78.
(4) (1798) 4 Ves. 76.
(5) (1861) 3 D. F. & J. 279.
(6) (1687) 1 Vern. 473.
(7) (1801) 6 Ves. 52, 64.
(8) (1823) T. & R. 260, 269.
(9) (1883) 8 App. Cas. 812.

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existed for a couple of centuries it would be very rash indeed to interfere with that system of construction, when it has been so laid down as a principle to guide people whose duty it is to construe wills. But when the question comes before us of extending that supposed rule or line of authority to a case which certainly is not literally included in that principle, I think I am at liberty to say that, whatever may be my view of the original rule, I for myself will decline to apply that principle to any new case so as to extend the rule.

Accordingly, my Lords, when I look at this case and see the judgments of the Master of the Rolls and of the learned judges who concurred with him (one of them only concurred, without giving his reasons), I come to the conclusion that this case is not within the rule. And if it is not within the rule, what follows from that is that these executors take that which is, as the effect of law, a bequest to them, and take it for themselves beneficially. The Act of Parliament which has remedied the case, if it be a remedy, or has at all events applied a new rule where there is something which guides and directs whither the estate should go, does not apply here. There is no one here who would be a legatee according to the Statute of Distributions, and therefore we have to treat this case as governed by the old law. It being governed by the old law, these gentlemen who have been by law made the executors are entitled, being made the executors, to retain the residuary estate, unless there be what has been variously described as "an irresistible presumption" or "a strong and violent presumption" that the executors are to be deprived of that which by law they are already vested with, namely, the estate for their own use beneficially.

My view therefore is that I will not be a party to extending the old rule to a state of things to which it did not apply in its inception. It is enough for me to say that the reasons which point to the difference between this case and the cases to which the rule applies have been pointed out with great precision by the Master of the Rolls and by Buckley L.J. Under these circumstances I am of opinion that this appeal should be dismissed with costs, and I move your Lordships accordingly.

LORD ASHBOURNE. My Lords, I concur.

LORD MACNAGHTEN. My Lords, I concur. A very clear statement of the law is to be found in the case of *Mapp* v. *Elcock* (1) in the judgment by Lord Cottenham. His Lordship says: "It must be borne in mind that the title of an executor to personalty not otherwise disposed of did not arise from any gift of the testator, but from the operation of law incident to the office. The law vested the property in the executor, and if the testator had not directly or indirectly declared any purpose to which he was to apply it, there was nothing to interfere with the legal title of the executor, and he therefore retained such property for his own benefit; but this result being as was supposed generally unforeseen and not intended by the testator, equity considered many circumstances as indicative of an intention contrary to the claim, and when they were found in the will, declared the executor trustee for the next of kin."

My Lords, the circumstances which have given rise to the present question are peculiar. There is no reported case in point. And I agree with the noble and learned lord on the woolsack that the rule of construction which has been invoked on the part of the Crown, founded as it is on authority rather than on reason, ought not to be extended or recast and amended to fit a new case. Notwithstanding the very ingenious and able argument of Mr. Sargant, I am not persuaded that there is the distinction which he asked your Lordships to draw between one part of the personal estate and another, or that the rule in question is satisfied if the executors are given pecuniary legacies of equal amount though they take specific legacies differing in value. There are in this will unequal gifts of personalty to the executors, and that circumstance of itself prevents the rule applying, even if there is any place for such a rule in a case where there is no trace or suggestion on the face of the will of the existence of any relative, and where all the beneficiaries are proved to be strangers in blood and no claimant has made out a title as next of kin to the testator.

(1) (1849) 2 Ph. 793, at p. 796.

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LORD JAMES OF HEREFORD. My Lords, I concur.

LORD COLLINS. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 10, 1908.

Solicitors: *Treasury Solicitor; Stanley, Woodhouse & Hedderwick.*

[HOUSE OF LORDS.]

H. L. (E.) 1908 *July* 14.

HIRST & CAPES AND ANOTHER . . . . . APPELLANTS;

AND

FOX AND OTHERS . . . . . RESPONDENTS.

Practice—Costs—Solicitor—Taxation—Agreement by Third Party to pay Costs—Question as to Construction of Agreement—Jurisdiction of Master—Payment of Bill—"Special Circumstances"—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 38.

The parties to an action agreed to a compromise upon the terms that the defendants should pay the costs of all parties as between solicitor and client in relation to the plaintiff's claims against the defendants. The plaintiff paid her solicitors their bill of costs and claimed the amount from the defendants, who then took out a summons for a reference to the taxing Master to tax the plaintiff's costs in accordance with the agreement of compromise. The plaintiff's solicitors opposed the application on the grounds that the bill had been paid and that questions would arise on the construction of the agreement which ought to be decided in an action and not by the taxing Master:—

Held, that under the circumstances an order for a reference was justified by s. 38 of the Solicitors Act, 1843.

Decision of the Court of Appeal, reported as *In re Hirst & Capes*, [1908] 1 K. B. 982, affirmed with a slight variation.

THE circumstances under which the order for a reference was made by the Court of Appeal (Farwell and Kennedy L.JJ.,

Vaughan Williams L.J. dissenting or doubting) are told in the report of the decision of that Court. The arguments there urged on both sides are also fully reported, and need not be repeated here.

The order made by the Court of Appeal allowed the appeal with costs to be taxed and paid by Hirst & Capes and their client the plaintiff to the defendants, and (inter alia) ordered a reference to the taxing Master to tax the bill of Hirst & Capes against the plaintiff.

July 6, 13, 14. *C. A. Russell, K.C.*, and *A. H. Poyser* (*Koppel* with them), for the appellants.

Danckwerts, K.C., and *J. A. Compston*, for the respondents.

C. A. Russell, K.C., in reply.

LORD LOREBURN L.C. My Lords, your Lordships' time has been occupied, and in my opinion wasted, for nearly two days. A few shillings might and ought to have settled any real difference between the two parties. I regret exceedingly that it has been possible for proceedings of this kind to travel so far.

In my opinion the order of the Court of Appeal is right except as to Miss Elsworth (the plaintiff) being made liable to pay costs. Her solicitors, Messrs. Hirst & Capes, handed to the defendants a bill of costs in the very terms of the agreement of July 18, 1906. They say that Miss Elsworth is liable to them for the whole of it; they say that the defendants are liable to Miss Elsworth for the whole of it; and they are not to be heard to say now that s. 38 does not apply. I do not enter further into that matter because Lord Macnaghten is about to refer to it, and I agree with the opinion which he holds.

If any question of difficulty arises in the taxation, let the officer certify specially the circumstances which he thinks he ought so to note. He should bring in Miss Elsworth to the taxation if she desires it, which it is scarcely conceivable she can, provided she is properly advised.

Then as to the costs of these proceedings, I consider that they have been petty to an extreme degree. A point of law was

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suggested as very important to solicitors, and it may be that it is of importance to them. It is a point of no interest or utility whatever either to Miss Elsworth or to the defendants. The expense of fighting it must be paid by those who are interested in it and responsible for advancing it.

I move your Lordships to vary the order of the Court of Appeal accordingly.

LORD ASHBOURNE. My Lords, I entirely concur in the opinion expressed by the Lord Chancellor. I cannot but think that it is very unfortunate that so very much of your Lordships' time should have been occupied by a case of this kind, a fight about costs and about the most technical aspect in which costs could be regarded.

I think the Court of Appeal were right in the view that they took of the case, and that their order should, with the modification suggested by the Lord Chancellor, be adopted. I cannot think myself that there is any very serious difficulty in the case, and I think the section which has been so often referred to applies.

LORD MACNAGHTEN. My Lords, I must say that I was a good deal impressed by Mr. Russell's argument, and I am not altogether satisfied that the new practice in regard to taxations under s. 38 is in accordance with the directions contained in the Act of Parliament. But I do not think that the question arises in this case; and I desire to be understood as not expressing any opinion upon it one way or the other. It seems to me, having regard to the terms of the agreement of compromise and the way in which the bill was prepared and presented to the defendants, that the order in question in this case is justified by s. 38.

I also wish to add that in my opinion the construction of the agreement of compromise as regards costs ought not to be considered as concluded or even affected by what fell from Farwell L.J. His Lordship's remarks were clearly obiter. The construction of the agreement is for the judge if either of the parties should think it has not been properly

construed in the taxation proceedings and desires to appeal to him.

I agree with the order proposed by the Lord Chancellor.

Order of the Court of Appeal varied by directing that the costs of the appeal in the Court of Appeal be paid by the appellants Hirst & Capes and not by Emma Elsworth; that her costs of being brought in be paid by the respondents; that no other costs of these proceedings be charged against Emma Elsworth by the appellants; and that the costs of this appeal, both of Emma Elsworth and the respondents, be paid by the appellants.

Lords' Journals, July 14, 1908.

Solicitors: *Wm. Stubbs, for Hirst & Capes, Harrogate; Corbin, Greener & Cook, for Barber & Blackburn, Harrogate.*

[HOUSE OF LORDS.]

URBAN DISTRICT COUNCIL OF WOOD GREEN . . . . . } APPELLANTS;

AND

JOSEPH . . . . . RESPONDENT.

H. L. (E.) 1908 *July* 24.

Local Government—Sewer—"Single private Drain"—Pipe receiving Drainage from Sewer—Connection with public Sewer—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.

Several houses of different owners stood in a row and were drained in pairs; each house of each pair was drained by a separate pipe into a pipe common to both houses, and each of these common pipes discharged into a line of pipes laid in private ground which discharged into a public sewer. The "common pipes" were admittedly "sewers" within the Public Health Act, 1875:—

Held, that the "line of pipes" which discharged into the public sewer was not "a single private drain" within the meaning of s. 19 of the

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Public Health Acts Amendment Act, 1890, and therefore that proceedings could not be taken under that section and s. 41 of the Public Health Act, 1875.

Decision of the Court of Appeal, [1907] 1 K. B. 182, affirmed on the above ground, and not upon the ground upon which that Court decided.

THE circumstances of this appeal are stated in the judgment of Lord Atkinson.

May 8, 15. *Sir Robert Finlay, K.C.*, and *Macmorran, K.C.* (*Clement Edwards* with them), for the appellants. The pipes common to each pair of houses are drains, and not sewers repairable by the appellants; but even if they are sewers, the respondent's houses are connected with a sewer by a single private drain. The "line of pipes" receiving the drainage of these sixteen houses is a "single private drain" within the meaning of s. 19 of the Public Health Act, 1890. By s. 19, sub-s. 3, "the expression 'drain' includes a drain used for the drainage of more than one building." The word "single" means one, and "private" means something of which the public have not the use, to which, though it may be vested in a public authority, there is no access without the consent of the private person. By s. 23 of the Public Health Act, 1875, the local authority can enforce effectual drainage only by written notice to the owner or occupier to make a drain into a sewer; and by s. 21 the owner or occupier is entitled on notice to empty his drains into the sewer; and by s. 13 all sewers are vested in the local authority. This one single drain which is "private" fulfils these requirements, and the case is similar to *Bradford* v. *Mayor of Eastbourne* (1), where the authorities are collected: *Self* v. *Hove Commissioners* (2) was followed and *Hill* v. *Hair* (3) disapproved. In both the former cases the liability of the owner was established. *Jackson* v. *Wimbledon Urban Council* (4) covers this appeal, it being held that a "sewer" might discharge into a "private drain." Thus, though the pipe conveying the sewage of each pair of houses was a "sewer," the pipe receiving the sewage of several such pairs of houses is none the less a "private drain," to be maintained and repaired by owners and

(1) [1896] 2 Q. B. 205.
(2) [1895] 1 Q. B. 685.
(3) [1895] 1 Q. B. 906.
(4) [1905] 2 K. B. 27.

occupiers. *Pemsel and Wilson* v. *Tucker* (1) and *Thompson* v. *Eccles Corporation* (2) support the appellants' contention.

Danckwerts, K.C., and *Randolph A. Glen*, for the respondent. The alleged "private drain" is a sewer for the maintenance and repair of which the public authority is under ss. 4, 13, 15 and 19 of the Public Health Act, 1875, responsible, and is not a "single private drain" under s. 19, sub-s. 1, of the Public Health Act, 1890. The legislation is somewhat obscure, but the solution of the difficulty suggested by the appellants is anomalous. The pipe connecting each pair of houses is admitted to be a sewer, and it would be a strange result that whilst the channel conveying the sewage of two houses is a sewer, the larger pipe into which it flows for the sewage of sixteen houses should be a drain. If the local authority allows a nuisance arising out of its neglect with respect to a sewer, it is indeed strange if it should be permitted to throw the burden of abatement on the private owner. *Thompson* v. *Eccles Corporation* (2) is no authority for the appellants' view that a pipe into which a sewer discharges can be a "single private drain." There are three possible meanings of the term "single private drain": (1.) what it says—one drain belonging to one person; (2.) a drain of which the surroundings are private; (3.) as Lord Russell C.J. said in the *Eastbourne Case* (3)—"a drain originally constructed for the drainage of one or more houses, as distinguished from a drain or sewer which any member of the public may have a right to use by connecting it with the drain from his own house." None of these meanings attaches to the present alleged "single private drain," and the respondent's houses are not so connected with a sewer, inasmuch as an admitted sewer intervenes: see also *Hedley* v. *Webb.* (4)

Sir Robert Finlay, K.C., in reply.

The House took time for consideration.

July 24. LORD LOREBURN L.C. My Lords, I have had the advantage of seeing the opinion about to be delivered by my

(1) [1907] 2 Ch. 191.
(2) [1905] 1 K. B. 110.
(3) [1896] 2 Q. B. 205, 211, 213.
(4) [1901] 2 Ch. 126.

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noble and learned friend Lord Atkinson. I agree with it, and have nothing to add.

LORD ASHBOURNE. My Lords, the facts in this case are not in dispute; they are not numerous or complicated. The questions are as to the rights claimed by the appellants under s. 19 of the Public Health Act of 1890. The words relied on are: "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain." This involves two questions: (1.) Are the respondent's houses connected with a public sewer by a single private drain? (2.) Is the conduit A to K a single private drain?

The Court of Appeal found for the respondent on the first ground, while the King's Bench Division found for the respondent on the second. If either ground is correct, the appeal must be dismissed. The authorities on the subject appear to conflict and cannot be reconciled.

It is to be assumed that the Legislature desired in this section to give some clear guidance and to lay down some logical and intelligible rule; but, notwithstanding, it is manifest that its words leave scope for differences of opinion as to its meaning and possible application. Indeed, the Lord Chief Justice thought the position so unsatisfactory that he suggested that further legislation was desirable, and Lord Russell C.J. in the *Eastbourne Case* (1) said that "steps ought to be speedily taken to reduce the existing chaos into system and order."

On the first point I agree with the Court of Appeal. I cannot hold that the houses are connected with the public sewer by a single private drain, when admittedly the connection was interrupted on the way by a public sewer. I am aware that in this code sewers and drains are interwoven in their definitions, and that generally sewers include drains while sometimes drains are excluded from such inclusion. Occasionally a conduit may be, it is contended, a sewer for some purposes and a drain for others, which is calculated to lead to some confusion. The actual facts of the present case are few and clear, but, having regard to the authorities, require close consideration. The

(1) [1896] 2 Q. B. 205, 211, 213.

starting-point from the houses was a private drain, then came an admitted sewer, and then came the conduit A to K. Even assuming that the conduit A to K was a single private drain, still the connection was broken by the intervention of a sewer, and therefore, I think, the section cannot apply.

In my opinion "connected" means connected the whole way from the houses to the public sewer by a single private drain. We are dealing with an artificial state of facts and language, but in my opinion the meaning I suggest is the most obvious and natural. Suppose that the greater part of the connection was by a sewer, and only a small part at either end or at both ends or in the middle was by a single private drain, could it be urged that the large connection by sewer was to be ignored, and that the fact that a small part of the connection was by a single private drain should shift the burden from the public authority to the householder? The Court of Appeal unanimously decided against the appellants on the subject, and in my opinion they were right. It is, I venture to think, a more reasonable and sound conclusion than any other that can be suggested.

The King's Bench Division proceeded on the other ground and held that the conduit A to K was not a single private drain, and I think that they were also right. We know no details of the history of that conduit, or to what extent sewers like that in the present case were discharged into it, and I can find nothing in the sections of the Act of 1875 or the Act of 1890 to lead me to the conclusion that your Lordships should hold it to be a single private drain. I respect the authorities which appear to support another conclusion, although it may be that they are explicable on their own facts. The *Eastbourne Case* (1) has been much discussed before your Lordships, and I am prepared to leave it as it was dealt with by the Lord Chief Justice. I cannot find in any of the cases that an admitted sewer discharged the sewage of the houses into the drain that was claimed to be a single private drain. In my opinion this distinction is of high importance, and, on this state of facts, common sense suggests that the conduit A to K which receives the contents of sewers—it may be of very many sewers—is itself a sewer. I can find no

(1) [1896] 2 Q. B. 205.

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statutable bar to this conclusion, and I cannot see why I should seek to give an artificial construction to plain facts.

Why the section only applies to cases where there are different owners it is hard to understand. It leads to some curious results in the present case. A conduit is admitted to be a sewer when there is only one owner, and it is sought to make the conduit into which its sewage is discharged (A to K) a single private drain because it is used by different owners. No wonder Lord Russell saw chaos in the existing legislation.

In my opinion the King's Bench Division was right as well as the Court of Appeal. They reached the same conclusion on different but not contradictory grounds, and in my opinion the order appealed from should be affirmed and the appeal dismissed with costs, and I so move your Lordships.

LORD ATKINSON. My Lords, the facts of this case are simple, and, so far as material, are as follows: Within the appellants' district are two roads intersecting at right angles—the one, Marquis Road, running east and west, in which a public sewer is laid, and the other, Parkhurst Road, running north and south, on the east side of which is situate a row of sixteen houses numbered consecutively from 2 to 32. Six of these, namely, 18, 20, 22, 24, 26 and 28, belong to the respondent and the remaining ten to other owners. At the back of this row of houses, and some short distance from them, is a line of pipes running parallel with Parkhurst Road, connected with and emptying itself into the public sewer in Marquis Road. It is styled the single private drain. It would be convenient to refer to it as drain K A. It is laid almost entirely in private ground, but the time when, the person by whom, and the purpose for which it was constructed is not stated, and for all that appears in the special case it may have been made before any of the above-mentioned houses were built. The houses in Parkhurst Road are all drained in pairs. The separate drains running from each house of the pair unite at a short distance from their point of departure, and their contents are then carried by a single conduit pipe into the drain K A and through and along that into the sewer in Marquis Road.

On October 29, 1902, a printed notice was sent to the appellants by their own inspector of nuisances that "a drain belonging to the premises 2 to 32, Parkhurst Road," or some one or more of the said premises, was "a nuisance." The appellants ordered their inspector to inspect the several drains so described. He examined them, and reported they were all in a bad condition and required alteration and repair. The appellants on February 11, 1903, acting on that report, gave notice to the owners of the several houses comprised in the said row, including the respondent, requiring them to execute certain specified works alleged to be necessary to put said drain K A in proper order and condition.

This the owners refused to do; whereupon the appellants, purporting to act under the powers conferred upon them by s. 19 of the Public Health Amendment Act, 1890, executed the necessary works themselves at a cost of 132*l.* 16*s.* 10*d.*, apportioned this sum amongst the several owners of houses in the row, and sued the respondent summarily before the justices to recover the sum of 49*l.* 16*s.*, his apportioned part of the outlay.

The claim was resisted on three separate grounds: (1.) That drain K A was not "a single private drain" within the meaning of s. 19 of the Act of 1890. (2.) That it did not "connect" the houses of the defendant with a "public sewer." (3.) That the notice served on the appellants, having been served by their own officer and not by a third party, was insufficient.

The justices decided this last point in favour of the appellants. The point was not dealt with in the Court of Appeal, and was not pressed in argument before your Lordships. It may therefore, for the purpose of this appeal, be put aside.

The justices dismissed the appellants' complaint, but consented to state a special case.

From this case it does not clearly appear whether they were of opinion that the drain K A was a single private drain within the meaning of the section, or whether they merely came to the conclusion that whether it was such a "drain" or not it did not "connect" the respondent's houses with the public sewer within the meaning of s. 19. The King's Bench Division (Lord Alverstone C.J., Lawrance and Ridley JJ.) affirmed the decision of the justices, on the ground, apparently, that drain K A was not a

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"single private drain" within the meaning of the section. And the Court of Appeal (Collins M.R., Cozens-Hardy and Farwell L.JJ.) upheld that decision, upon the ground, apparently, that whether it was a "single private drain" or not it did not "connect" the respondent's houses with the public sewer as required.

The decision of the case turns upon the construction of this s. 19. That is a question upon which there has been considerable conflict of judicial opinion. Your Lordships have been referred to the several authorities in which these conflicting opinions are expressed.

In order to determine what is the particular subject-matter to which the section was intended to apply, it is, I think, necessary to examine the wording of s. 41 of the Public Health Act, 1875, and to consider what is the general nature of the drainage system it was designed by that statute to set up, as well as the relative rights and powers it conferred, and duties and obligations it imposed upon public sanitary authorities on one side and owners and occupiers of houses within their districts upon the other. Sect. 2 of the Act of 1890 provides that it is to be construed as one with the Public Health Acts, and by s. 11, sub-s. 3, if not inconsistent with the context, the word "drain" is to have the same meaning as in the Public Health Acts.

That drainage system is dealt with in the fasciculus of sections of the statute of 1875 from 13 to 41, both inclusive. By s. 13 all existing and future sewers within the district of the local authority, together with all the buildings, works, and materials belonging thereto, are, with the three classes of exceptions therein mentioned, vested in that authority and placed under its control. Under s. 15 the authority is bound to make such sewers as may be necessary for the purposes of the Act and to keep all sewers belonging to them in repair; and by s. 19 it is made imperative upon them that they should cause the sewers belonging to them to be covered in, ventilated, and kept so as not to be nuisances or injurious to health and to be properly cleansed and emptied. By s. 18 they are enabled to enlarge, lessen, alter the course of, or cover in any sewer belonging to them, and under certain circumstances to close and destroy it; while by s. 16 power is conferred upon them to carry any sewer belonging to them across

or under any public road or street, or, under certain conditions, through or under any lands whatever within their district. They are empowered by s. 14 to purchase or otherwise acquire any sewer or any right of making, or of user, or other right in or respecting any sewer within their district. Of the remaining twenty-one sections in this fasciculus nine deal with the duties, powers, and obligations of owners and occupiers of houses within the district of the local authority. By s. 21 the owner or occupier of any such premises is, under certain conditions, entitled to cause his drains to empty into the sewers of the local authority; and by s. 23 that body may require the owner or occupier of any house within its district which is without a drain "sufficient for effectual drainage" to make a covered drain or drains emptying into a sewer which the local authority are entitled to use, not being more than 100 feet from the site of such house, or if there be none such within that distance, then emptying into such covered cesspool or other place as the local authority may direct. And if the owner or occupier fail to execute the works required, the local authority may itself execute them and recover the cost from the owner of the house.

Again, s. 25 renders it unlawful in any urban district to erect any house, or rebuild any house which has been pulled down to the ground floor, or to occupy any house so newly erected or rebuilt, unless and until a covered drain or drains be constructed in such manner as the officer of the urban authority approves, which shall empty into a sewer which that authority is entitled to use, if within 100 feet of some part of the site of the house so newly erected or rebuilt, or if there be none such within that distance, then into a covered cesspool or such other place as the authority may direct; ss. 27 to 34, both inclusive, deal with the disposal of sewage; ss. 35 to 39 with sanitary works of accommodation, public and private; s. 40 enacts that every local authority shall provide that all drains and the other sanitary works therein mentioned shall be constructed and kept so as not to be nuisances or injurious to health; and s. 41 prescribes the machinery by which the owners of houses may, as regards drains and the other sanitary works therein mentioned, "on or belonging to" any premises within their district, be

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compelled to discharge the obligation imposed upon them by the previous section.

The machinery is this: The local authority can, after serving notice on the occupier, examine the drains, &c. If they find these defective they can require the owner or occupier to set them right. If the notice be not complied with, the person on whom it is served incurs a penalty of 10*s.* per day for every day he is in default, and the local authority may itself execute the necessary work and, if so minded, recover the cost from the owner. These are the means available to a local authority to compel the owners and occupiers of premises to maintain the drains "on or belonging to those premises" so as not to become nuisances or injurious to health.

If the legislation stopped there the rights and obligations of the respective parties would be fairly clear. Whether the owner of two or more houses, in discharge of his obligation under ss. 23 and 25 of the statute, caused the drainage from each to be carried in a separate and independent drain into "the sewer which the local authority was entitled to use," or to the cesspool they designated for it, or laid their drains so as to unite, and thereby caused the drainage from several houses to be carried by one conduit from the point of junction to the same sewer or cesspool, was a matter of indifference so long as the drainage was efficient. This conduit, which may be referred to as the "common conduit," would, according to the ordinary meaning of language, be a "drain"; it would be "single," would be "private," would probably be situate, in whole or in part, "on the premises" of the person who constructed it, and, even if not, having been made by him to carry off the drainage of his own houses, "would 'belong' to his premises," and he would be obliged to keep it in good order.

Neither would there seem to be anything objectionable in the owners of two or more houses providing for the drainage of their houses on a similar plan. The "common conduit" in their case also would most probably be situate on the premises of one or more of them, or at all events, would "belong to their premises"—would be "single" and "private," and must be properly maintained by those owners whose houses it served.

The definition of the word "drain," coupled with that of "sewer," contained in the 4th section of the Act causes all the difficulty. According to that definition a drain, to be a "drain" within the meaning of the Act, must have as termini at one end one "building, or some premises within the same curtilage," and at the other end "a cesspool or other like receptacle for drainage, or a sewer into which the drainage of two or more buildings occupied by different persons is conveyed"; while the word "sewer" includes sewers and drains of every description except drains to which the word "drain" interpreted as aforesaid applies, and also except drains "vested in or under the control of any authority having the management of roads and not being a local authority under this Act."

The consequence is that in each of the cases above mentioned, by force of this definition, the drain I have designated as the "common conduit" ceases to be a drain, is raised to the dignity of a sewer, and is vested in the local authority, who becomes bound to maintain it at the public expense.

These would appear to me to be grotesque results.

The statute of 1890 was, I think, passed to correct the second of them, namely, the result where the "common conduit" carried to a sewer or cesspool, or the like receptacle, the drainage of two or more houses belonging to different owners. It left the other result untouched.

Its object was, I think, to bring within the reach of the machinery of the 41st section of the Act of 1875 one of the two classes of drainage conduits which, by force of this artificial definition of "drain," were placed outside its operation and to transfer to the shoulders of the owners of the houses which this class of conduits served the burden of maintaining them. But this class, in my view, only comprised conduits which ss. 23 and 25 require the owners to provide, or see were provided.

As the drain K A does not, on the facts stated in the case, appear to be one to which s. 23 or s. 25 applies, or one which, irrespective of the definition, would have come within the purview of s. 41, it is not, I think, a "single private drain" within the meaning of s. 19 of the Act of 1890.

The second objection is that even if the drain K A be "a single

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private drain" within the meaning of s. 19 of the Act of 1890, it does not "connect" the houses of the different owners in the row with the public sewer in Marquis Road.

If this objection means that in order that a drain should "connect" houses with a public sewer the drainage of the houses must, through its entire course from the houses to the public sewer, pass through this drain and none other, then no "single private drain" would be within the section which was not laid under the several houses it was so to connect, otherwise there must always be some independent conduit which conveyed the drainage of the houses into it, and the whole object of the section would be defeated.

But if it means less than this, then, if this drain should be held to have connected these houses with the sewer in Marquis Road where it carried to that sewer the drainage emptied into it by separate and independent drains one coming from each house, it is difficult to see why the same conclusion is not to be arrived at where the conduits carrying that sewerage have been united into trunks styled "sewers" and emptied the same drainage into it.

But for the drain K A the drainage of the houses would never have reached the sewer in Marquis Road at all. I think this drain K A connects the houses in this row with that sewer within the meaning of this section when it receives the drainage coming from them through sewers made by their owners and carries that drainage to the public sewer in Marquis Road.

On this latter point I think the conclusion of the Court of Appeal was erroneous, but on the whole case I am of opinion that the appeal should be dismissed with costs.

My Lords, I am requested by my noble and learned friend Lord James of Hereford to say that he concurs in the judgment I have read.

LORD MACNAGHTEN. My Lords, I have had the advantage of reading the judgment which has just been delivered by my noble and learned friend Lord Atkinson, and I agree with it.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 24, 1908.

Solicitors: *Croft & Mortimer; Miles, Hair & Co.*

[HOUSE OF LORDS.]

GREENSHIELDS, COWIE & CO. . . . . APPELLANTS;

AND

STEPHENS & SONS, LIMITED . . . . . RESPONDENTS.

H. L. (E.) 1908 *July* 31.

General Average—Cargo of Coal—"Inherent Vice"—Spontaneous Combustion—Liability of Ship to contribute to General Average—York-Antwerp Rules, 1890, *r.* 3—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 502.

Coal shipped without negligence on the part of any one took fire by spontaneous combustion, and the water used in extinguishing the fire damaged the whole cargo of coal:—

Held, that by maritime law the owners of the coal were entitled to claim against the ship contribution in general average in respect of the sacrifices voluntarily made for the common advantage of all, the fire having been caused by the inherent qualities of the coal, or, in other words, by spontaneous combustion, without default on the part of the shippers;

Held, also, that this principle was not affected by the York-Antwerp Rules which were incorporated in the bills of lading;

Held, also, that the Merchant Shipping Act, 1894, s. 502, afforded no defence to the claim.

Decision of the Court of Appeal, [1908] 1 K. B. 51, affirmed.

THE circumstances of this appeal are stated in Lord Halsbury's judgment. Channell J. held that the owners of the coal were entitled to claim a contribution in general average against the ship. The Court of Appeal (Lord Alverstone C.J., Buckley and Kennedy L.JJ.) affirmed this decision. Hence this appeal.

July 9. *J. A. Hamilton, K.C.*, and *Maurice Hill*, for the appellants. The common peril, the fire, having been brought about by the inherent vice of the coal, the coal owners are not in law entitled to have made good in general average the damage done to the coal by the means used to extinguish the fire. By s. 502 of the Merchant Shipping Act, 1894, "The owner of a British sea-going ship . . . . shall not be liable to make good to any extent whatever, any loss or damage happening without his actual fault or privity . . . . (1.) where any goods . . . . taken in or put on board his ship are lost or damaged by reason of fire on board the

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ship." The statutory exemption of the owner from liability was allowed in *The Diamond* (1), where it was held that the damage by smoke and water was damage "by reason of fire." The decision of Blackburn and Lush JJ. in *Schmidt* v. *Royal Mail Steamship Co.* (2), under the corresponding section (s. 503) of the Act of 1854, is adverse to the appellants, but it is submitted that the decision is wrong and ought to be overruled. When a person puts a vicious or dangerous article on board he cannot claim a contribution from the property which he has imperilled. This is a sound principle in itself, though it may be excluded by express or implied contract, or by assent of parties; but there is nothing of the kind here. A typical example of the principle is deck cargo, which in *Wright* v. *Marwood* (3) was held not to be entitled to a general average contribution inasmuch as it is exposed to special peril. *Burton* v. *English* (4) was a different case, as the cargo was properly jettisoned for the sake of the shipowner. Here there was an exceptional peril caused by one cargo owner, and the case is analogous to that of deck cargo. It was held in *Strang* v. *Scott* (5) that there was no right of contribution in favour of those whose acts have led to the jettison. *The Carron Park* (6) was decided on the terms of an express contract. It was approved in *Milburn* v. *Jamaica Fruit Co.* (7) by A. L. Smith and Romer L.JJ. and disapproved by Vaughan Williams L.J., but neither of these cases affects the present. *The Mary Thomas* (8) also depended upon special circumstances. In *Pirie* v. *Middle Dock Co.* (9), where damage was caused by water in extinguishing fire, Watkin Williams J. expressed the opinion, which was, however, not necessary to the decision, that the cargo, on account of its inherent vice, was not entitled to contribution in general average. *Schloss* v. *Heriot* (10) was decided on the ground of avoidance of circuity of action, and that case and *The Ettrick* (11) are in

(1) [1906] P. 282.
(2) (1876) 45 L. J. (Q.B.) 646.
(3) (1881) 7 Q. B. D. 62.
(4) (1883) 12 Q. B. D. 218.
(5) (1889) 14 App. Cas. 601.
(6) (1890) 15 P. D. 203.
(7) [1900] 2 Q. B. 540.
(8) [1894] P. 108.
(9) (1881) 44 L. T. 426.
(10) (1863) 14 C. B. (N.S.) 59; 32 L. J. (C.P.) 211.
(11) (1881) 6 P. D. 127.

principle favourable to the appellants as shewing that the person in fault must suffer.

Next, the appellants come within the exception in r. 3 of the York-Antwerp Rules, 1890: "No compensation shall be made for damage to such portions of the ship and bulk cargo . . . . as have been on fire." Portions of the bulk cargo were on fire, and there was evidence to shew that 75 per cent. was affected by fire only. The exact question has not been decided, but the American decision *The Irrawaddy* (1) is in the appellants' favour, and in Carver on Carriage by Sea, ss. 373a, b, it is laid down as law that the person whose fault has produced the danger is not disentitled to contribution, but is not allowed to recover it owing to the rule against circuity of action.

Scrutton, K.C., and *Mackinnon*, for the respondents. The respondents do not claim for loss by fire, but for goods sacrificed to avoid or suppress fire. An unforeseen, unexpected danger arose from which one or more of the interests involved were bound to suffer and for which a sacrifice had to be made. This was the common case of general average, and the doctrine of inherent vice invoked on behalf of the appellants would do away with the whole law of general average. Suppose a mast were to break in consequence of some latent flaw in the timber, would no contribution be allowed in general average? *Schloss* v. *Heriot* (2) has no application, as the vessel was unseaworthy and the cargo owner, against whom a general average contribution was claimed, would have had a right of action against the shipowner. This is a plain, ordinary case of general average, a voluntary sacrifice for the common good of the whole adventure within the judgment of Willes J. in *Johnson* v. *Chapman* (3), which was misunderstood by Watkin Williams J. in *Pirie* v. *Middle Dock Co.* (4): see also *Robinson* v. *Price.* (5) In *Strang* v. *Scott* (6) Lord Watson says: "The Rhodian law, which in that respect is the law of England, bases the right of contribution, not upon the causes of the danger to the ship and cargo, but upon its actual presence." The only

(1) (1898) 171 U. S. 187.
(2) 14 C. B. (N.S.) 59; 32 L. J. (C.P.) 211.
(3) (1865) 35 L. J. (C.P.) 23; 19 C. B (N.S.) 563.
(4) 44 L. T. 426.
(5) (1876) 2 Q. B. D. 91.
(6) 14 App. Cas. 601, at p. 609.

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authorities which lend any colour to the appellants' contentions are the dictum of Watkin Williams J. in *Pirie* v. *Middle Dock Co.* (1) and the dissentient judgment of Vaughan Williams L.J. in *Milburn* v. *Jamaica Fruit Co.* (2)

Maurice Hill in reply.

The House took time for consideration.

July 31. EARL OF HALSBURY. My Lords, this is an appeal by the plaintiffs in the action against a judgment of the Court of Appeal affirming a judgment of Channell J. in favour of the defendants. The facts are not in dispute.

The plaintiffs are the owners of the steamship *Knight of the Garter*. The ship *Knight of the Garter* was chartered on March 23, 1905, to carry a cargo of coal from Calcutta to Bombay.

The ship was loaded with 8777 tons of steam coal and 195 tons of hard coke. The vessel, being thus loaded, started from Calcutta on April 25. The ordinary voyage from Calcutta to Bombay is nine days. She did not reach the Hooghly bar until the 4th or 5th of May, and in order to cross it she had to discharge part of her cargo into lighters and reload it outside. She left the Hooghly on the evening of May 6. On May 9 smoke was seen to be rising from one of her holds. On the two following days great heat was developed, explosions were heard and fire seen, and it was decided to proceed to Colombo.

During the voyage from the 9th till the 12th, when she arrived at Colombo, steam was injected into the holds in order to check the fire. Surveyors were consulted, and finally it was decided that the entire cargo should be discharged. This was accordingly done, and during this operation the coals were pumped upon, and in the end the coals were found to be damaged to the extent of 25 per cent., partly by fire and partly by water. The ship herself was also considerably damaged by the fire. An average adjustment was accordingly prepared, but its conclusions were disputed on the ground that the owners of the cargo were not entitled to any general average because, first, the fire arose from the inherent vice of the coals shipped by them. This, indeed,

(1) 44 L. T. 426. (2) [1900] 2 Q. B. 540.

was the main contention, though there were two other subordinate points to be dealt with hereafter. Mr. Hamilton suggested it was a new point, but I fail to see any novelty or, indeed, any point at all in it.

The truth is that whatever plausibility existed in the argument was due to the use of a misleading phrase, i.e., "the inherent vice" of the cargo. The phrase is supposed to be justified by what is undoubtedly the fact, that the coals took fire from spontaneous combustion. The phrase was used in its proper application by Willes J., where it was pleaded as an excuse for non-delivery of a furious beast, which, notwithstanding that all reasonable means had been used by the carrier, broke loose from its place of confinement and was ultimately lost to the consignee, but without any default or error on the part of the carrier. (1) So, of course, though the expression is in such a case figurative, it might be used when excusing non-delivery; it might be applied to anything which by reason of its own inherent qualities was lost without any negligence by any one.

It is to the credit of the parties here that on neither side has there been any attempt to minimize or to exaggerate the facts as they are; but, with all respect to the learned counsel who argued for the appellants, the result is that it is very difficult to say there is one arguable point of law in their favour. It is absolutely clear that it was a common adventure, that it was for the safety of all, including cargo and ship, that the voyage was put an end to at Colombo, and the measures properly and prudently taken to save both. Prima facie, therefore, it was clearly a case of general average, and, as I have pointed out, it is the misleading phrase "inherent vice" that has lent plausibility, but an absolutely fallacious effect, to the argument.

With respect to the point under the incorporated York-Antwerp rule upon which Channell J. decided the case, I am unable to agree with him, since, if the point I have dealt with here were a good one, I do not see how the incorporation of the York-Antwerp rule affects the question one way or the other.

As to the point under the statute, I agree with the Court of Appeal that it is much too late to raise such a point now, even if

(1) *Blower* v. *Great Western Rail. Co.*, (1872) L. R. 7 C. P. 655, 662.

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there were more in it than I think there is. The real answer, however, is that the statute is not dealing with average at all, and this has been in effect decided long ago, either upon the words of this statute or words which would have raised the same point in other statutes.

I confess myself unable to see any novelty in this case. It is not denied that there was a common adventure or that there was a common danger, that there was a sacrifice voluntarily made for the common advantage of all, and that the circumstances shew nothing which should exempt either party from the obligation to make good the sacrifices made for the common advantage of both. In the argument in *Johnson* v. *Chapman* (1), where the judgment was delivered by Willes J., it was urged that no one can maintain an action for a wrong where he has assented to, or contributed to, the act that occasioned his loss. Here the facts do not raise that question at all; the shipowner is a party to taking in his ship the coal, which it is assumed both parties are equally familiar with, and its liability to spontaneous combustion, and all the other circumstances, climate and quantity and depth of holds, and the peculiarities of the river Hooghly, are equally known to both.

I am therefore of opinion that this appeal ought to be dismissed, with the usual result as to costs.

LORD ASHBOURNE. My Lords, I concur.

LORD MACNAGHTEN. My Lords, I agree.

LORD COLLINS. My Lords, I agree.

EARL OF HALSBURY. My Lords, I have a telegram from my noble and learned friend Lord James of Hereford intimating that he concurs in the judgment. LAZY BOY

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 31, 1908.

Solicitors: *Waltons, Johnson, Bubb and Whatton; Thomas Cooper & Co.*

(1) 35 L. J. (C.P.) 23; 19 C. B. (N.S.) 563, 577.

[HOUSE OF LORDS.]

ISMAY, IMRIE & CO. . . . . APPELLANTS;

AND

WILLIAMSON . . . . . RESPONDENT.

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1908
July 31.

Employer and Workman—Compensation—Accident—Death by Heat-stroke—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A workman, in a weak and emaciated condition, while raking out ashes from under the boiler in the stokehole of a steamship received a heat-stroke, from the effect of which he died:—

Held (by Lord Loreburn L.C. and Lord Ashbourne, Lord Macnaghten dissenting), that this was a case of death by accident within the meaning of the Workmen's Compensation Act, 1906.

In July, 1907, the respondent's husband died while employed as a trimmer on the appellants' steamship at sea in the Atlantic. In an arbitration held in the county court of the county of the city of Belfast an entry in the log-book was put in stating that "at 1 P.M. the trimmer was brought on deck suffering from heat-stroke, temperature 106: he was placed in hospital for treatment; ice was applied and the temperature reduced to 101, when he became very violent, having to be held down. At 3 P.M. he died; cause of death was heat-stroke and exhaustion." The medical evidence is given in the judgments of Lord Ashbourne and Lord Macnaghten.

The Court of Appeal in Ireland (Sir Samuel Walker L.C. and Fitzgibbon L.J., Holmes L.J. dissenting) affirmed the decision of the county court judge, who held as a fact that death was caused by heat coming from the boiler; that it was an accident within the meaning of the statute; and that the respondent was entitled to compensation. Hence the present appeal.

July 7. *Danckwerts, K.C.*, and *Leslie Scott*, for the appellants. The man died by disease, not by accident. The disease was a common one in this class of work, and operated here upon a constitution already debilitated by want. There was nothing

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abnormal—nothing, to use Lord Macnaghten's words in *Fenton* v. *Thorley* (1), in the nature of "an unlooked-for mishap or an untoward event which is not expected or designed." There was simply a natural effect of a known cause; the result which happened might reasonably have been expected and predicted. The case is not like *Fenton* v. *Thorley* (1) or *Stewart* v. *Wilson's and Clyde Coal Co.* (2), where a strain from over-exertion was held to be an "accident." It cannot be said, to adopt Mathew L.J.'s words in *Steel* v. *Cammell, Laird & Co.* (3), that "the case was unexpected, fortuitous or unforeseen." An accident must be something external which supervenes in the conditions of the work, not of the man. *Brintons* v. *Turvey* (4) is distinguishable, because there was a definite circumstance to which the disease and the consequent operation under which the patient died were attributed, namely, the impact of an anthrax bacillus on the eye. There was here nothing of the kind. Death by sunstroke is not death by an accident. In *Sinclair* v. *Maritime Passengers Assurance Co.* (5), where sunstroke was the cause of death, Cockburn C.J. said that in the term "accident" is involved "some violence, casualty, or vis major. We cannot," he continues, "think disease produced by the action of a known cause can be considered as accidental." What is there in heat-stroke to distinguish it from sunstroke?

Abel Thomas, K.C. (*Morgan Morgan* with him), for the respondent. The death was caused by the sudden emission of rays from the furnace under the boiler as the man was kneeling before it. This was an "accident" in the popular sense of the term, which in *Brintons' Case* (4) is stated to be the sense of the Act. It was certainly an "unintended and unexpected occurrence," as Lord Lindley said in *Fenton's Case.* (1) The Act makes no difference between a vigorous and a frail man, and death was certainly unexpected, for the doctor in a long experience had known of only four cases and the engineer of only one. The Act of 1897 was in this respect re-enacted—in the light of Lord Macnaghten's definition in *Fenton's Case.* (1) The present case is

(1) [1903] A. C. 443, 448.
(2) (1902) 5 F. 120.
(3) [1905] 2 K. B. 232, 237.
(4) [1905] A. C. 230.
(5) (1861) 30 L. J. (Q.B.) 77, 80.

within the definitions in *Fenton's Case* (1) and in *Brintons' Case* (2), by which this House is bound.

Danckwerts, K.C., in reply. An accident may be an unexpected event, but not every unexpected event is an accident.

The House took time for consideration.

July 31. LORD LOREBURN L.C. My Lords, I agree with the judgment of the Court of Appeal.

The county court judge has found that this man died from an accident. There does not seem to me reason for dissenting from that view.

To my mind the weakness of the deceased which predisposed him to this form of attack is immaterial. The fact that a man who has died from a heat-stroke was by physical debility more likely than others so to suffer can have nothing to do with the question whether what befell him is to be regarded as an accident or not.

In the case of *Fenton* v. *Thorley* (1) the meaning of the word accident was very closely scrutinized. That case stands as a conclusive authority, and I would not depart from it if I could, nor need I repeat what was there said. The only question is of applying the law there laid down to the particular facts of this case.

In my view this man died from an accident. What killed him was a heat-stroke coming suddenly and unexpectedly upon him while at work. Such a stroke is an unusual effect of a known cause, often, no doubt, threatened, but generally averted by precautions which experience, in this instance, had not taught. It was an unlooked for mishap in the course of his employment. In common language, it was a case of accidental death.

I feel that in construing this Act of Parliament, as in other cases, there is a risk of frustrating it by excess of subtlety, which I am anxious to avoid.

LORD ASHBOURNE. My Lords, in this case I think that the decision of the Court of Appeal in Ireland was correct and that the appeal should be dismissed.

(1) [1903] A. C. 443, 448. (2) [1905] A. C. 230.

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Lord Ashbourne.

This is a claim by a widow for compensation under the Workmen's Compensation Act for the death of her husband, which she says was caused by an injury received through an accident arising out of and in the course of his employment.

There is no dispute as to the facts of the case. He was employed as a trimmer on board the *Majestic*. At the time of the accident he was working in a stokehole opposite the boiler, he received a heat-stroke from the rays of heat from the boiler impinging on his body, he became exhausted, and died in a few hours.

Was this an accident arising out of and in the course of his employment? With great deference to those who hold a contrary opinion, I can myself see no room for serious doubt on the subject. Everything was in the course of his employment and arising out of it. But for the boiler and the heat-stroke, and the speedy exhaustion it caused, there would have been no accident.

If the Act is to be interpreted according to its "ordinary and popular meaning," as Lord Halsbury said was right in *Brintons* v. *Turvey* (1), would not the generality of mankind say that what occurred was an injury caused by an accident? The authorities support this view. In *Fenton* v. *Thorley* (2), where a man ruptured himself in an exertion during his employment, Lord Macnaghten laid down that an "accident is used in the popular and ordinary sense of the word as denoting an unlooked for mishap, or an untoward event which is not expected or designed." Lord Lindley in the same case said that "in the Act the word is used in a very loose way," that it meant "any unintended and unexpected occurrence which produces hurt or loss." The Scotch case of *Stewart* v. *Wilson's and Clyde Coal Co.* (3), referred to with approval by Lord Macnaghten and Lord Lindley, is a valuable authority. In that case Lord M'Laren said, "if a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in, this is an accidental injury in the sense of the statute." The case of

(1) [1905] A. C. 233. (2) [1903] A. C. 443.
(3) 5 F. 120.

Brintons v. *Turvey* (1), the anthrax case, went, if possible, further, and there Lord Macnaghten reaffirmed his definition of "accident." In my opinion every word of that definition applies to the facts of this case, which are in many ways more simple and direct than those in the case of *Brintons* v. *Turvey*. (1)

Although a heat-stroke may be called a disease, it is in this case, in my opinion, a disease directly caused by an accident arising out of or in the course of an employment, particularly dangerous to Williamson, in consequence of his weak state of health. Its not being scheduled as an industrial disease in the Act of 1906 does not affect the question, for the Act expressly provides that "nothing shall affect the rights of a workman to recover compensation in respect of a disease to which the section does not apply, if the disease is a personal injury by accident within the meaning of the Act." I do not at all say that all diseases arising out of or in the course of employment should be regarded as a personal injury by accident, but I am of opinion that under the circumstances of this case and its facts Williamson was killed by a personal injury by accident, and that the appellants are accordingly liable.

In my opinion the appeal should be dismissed with costs.

Lord Macnaghten. My Lords, that the illness by which the deceased lost his life was one arising out of and in the course of his employment cannot be disputed. But I agree with Holmes L.J. that it does not come under the description of a "personal injury by accident." That expression as it seems to me would be equally applicable or equally inapposite in the case of an attack of bronchitis or pneumonia brought on by a sudden and violent chill disregarded or neglected at the outset.

The deceased, it appears, was a brass finisher by trade in this country. He went to the United States in the hope of bettering himself. He failed utterly. Destitute and half-starved, he applied to the Seamen's Mission in New York, and by their help obtained a passage home, shipping as a trimmer on board the steamship *Majestic*.

(1) [1905] A. C. 230.

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He seems to have been a miserable creature physically—undersized, underfed, and so emaciated that, as one of the witnesses says, "his bones projected."

The work of a trimmer is not heavy in itself. It is, no doubt, trying work, owing to the heated atmosphere of the stokehole where trimmers work, raking out the ashes of the furnaces. The men work in shifts, four hours on and eight hours off. The deceased had no experience of such work. He got through two shifts. On his third turn, after about an hour's work, he had a "heat-stroke," as it is called. He went on till he dropped in a faint. He was carried to hospital, recovered partially, then became violent, and died from exhaustion two hours after leaving the stokehole. Was that an injury by accident in the ordinary sense of the expression? I think not. The death was due to the physical state of the workman and "the nature" of the employment, to use the language of s. 8, sub-s. 6. It was, I think, just what anybody would have expected who saw the man and knew what a trimmer has to do. Add the fact that the man was wholly inexperienced, ignorant of what ought to be done in case of emergency, and the result would be a foregone conclusion.

The heat in the stokehole was considerable, though the furnace doors were closed. But the evidence was that the conditions were normal, the ventilation in perfect order, and the heat where the man was standing not more than 96 degrees. It was also in evidence that heat-strokes are common enough in the stokehole and in the engine-room, which is hotter than the stokehole. One witness, an engineer, who had been sixteen years at sea, said that he never knew an engineer, a stoker, or a trimmer not affected by the heat in the same way. But in the case of a man not physically unfit, who knows what to do when he feels the attack coming on, the illness seldom, if ever, leads to any serious consequence. Though the attack is developed rapidly, the symptoms are sufficiently clear and sufficiently gradual to give the sufferer warning in time to enable him to obtain relief by going on deck for fresh air.

I should be for allowing the appeal. But as your Lordships

take a different view, the appeal will, of course, be dismissed with costs.

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Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 31, 1908.

Solicitors: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool; G. R. Thorne, Robinson & Co., for Nathaniel Tughan, Belfast.*

[PRIVY COUNCIL.]

ULLMANN & CO. . . . . DEFENDANTS;

AND

CESAR LEUBA AND ANOTHER . . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

J. C.* 1908 *June* 25, 30; *July* 1, 2, 20.

Trade Mark—Assignment of Trade Mark—Breach of Trade Mark—Title to Damages.

In an action for infringement of trade marks it appeared that the business of selling watches in Hong Kong affected thereby did not belong to the plaintiffs and was not carried on for their benefit, but that they as manufacturers supplied to it the watches sold:—

Held, that they must be nonsuited for want of title to maintain the action.

APPEAL from a judgment of the Full Court (January 19, 1907) affirming a judgment of Piggott C.J. (July 26, 1906).

The respondents are watchmakers carrying on business at Fleurier, in Switzerland, and their watches are largely sold in Hong Kong through their agents, Gaupp & Co. The defendants are watchmakers carrying on business at Chaux-de-Fonds, in Switzerland, and also as wholesale and retail dealers at Hong Kong, and at Shanghai and elsewhere in China.

The action was brought in respect, first, of the infringement of two trade marks, called respectively the "Po Wai" and "Ina" marks, and of the passing off of the defendants' watches

* *Present:* LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

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as and for those of the plaintiffs by the use of the said trade marks and the names derived therefrom; and, secondly, passing off by the use of a border and an arrangement of horizontal lines called an "azure," which are commonly used by the plaintiffs with or as part of one of the said "Po Wai" marks, in order that purchasers from the defendants might engrave imitations of the "Po Wai" mark thereon and deceive the ultimate buyers.

Judgment was given for the plaintiffs in respect of the first part of their claim, that is to say, the infringement and passing off of and by means of the two trade marks, but against them in respect of the second part of their claim, that is to say, the use of the border and azure. The appeal was concerned only with the judgment so far as it was in the plaintiffs' favour, that is to say, so far as it related to the two trade marks.

Upon the question decided in this appeal, whether the respondents had proved such effective assignment to them of the trade marks as would entitle them to maintain this action, depending upon whether they had also an assignment of the business at Hong Kong to which the trade marks related, the Chief Justice ruled at the trial that verbal evidence had been given of such assignment without objection, and that, the case having proceeded on the footing that the assignment of the business had been duly made, it was too late to take the objection at the end of the trial. In appeal Wise J. found that there was not sufficient evidence of the assignment of the goodwill of the business to the respondents, while the Chief Justice found that it had been proved by the verbal evidence given at the trial and also on the appeal and by the documents, and that there was no proof that the business still belonged to Madame Bovet and not to the respondents.

Younger, K.C., *Sharp, K.C.*, and *A. C. Nesbitt*, for the appellants, contended that no sufficient evidence had been given by the respondents that there had been such an assignment to them of the trade marks as would entitle them to maintain this action, and that, as there had been no registration of them under the ordinances of the Colony, the condition precedent to their suing

had not been observed. Even if the trade marks had been assigned, there was no evidence that the assignment had any connection with the goodwill of any business existing at Hong Kong. The true view of the evidence is that the respondents were shippers of goods marked with the trade marks to Gaupp & Co. in Hong Kong for and on account of Madame Bovet, to whom the goodwill of the business continued to belong. Reference was made to *Pinto* v. *Badman* (1); *In re Trade Mark of Dewhurst & Sons, Ld.* (2); *In re Wellcome's Trade Mark* (3); *Johnston* v. *Orr Ewing* (4); *Grezier* v. *Autran* (5); *National Starch Manufacturing Co.* v. *Munn's Patent Maizena and Starch Co.* (6)

P. O. Lawrence, K.C., and *Kerly*, for the respondents, contended that on the evidence the trade marks were distinctive in the Colony of watches made by them, and that the use thereof by the appellants in respect of other goods was calculated to deceive purchasers and to pass off such goods as and for the respondents' goods. It was proved that the goodwill of the business of the Bovet firm had been duly assigned to them, and that that goodwill was at the commencement of the action actually possessed by and vested in them. Reference was made to *Whitstable Oyster Fishery Co.* v. *Hayling Fisheries* (7); *La Société Anonyme des Anciens Établissements Panhard et Levassor* v. *Panhard Levassor Motor Co., Ld.* (8); *Dent* v. *Turpin* (9); *The Eureka Case, Ford* v. *Foster* (10); *Proctor* v. *Bennis* (11); *Fullwood* v. *Fullwood* (12); *National Starch Manufacturing Co.* v. *Munn's Patent Maizena and Starch Co.* (13) On the point as to the assignment of the goodwill see *Collins & Co.* v. *Brown.* (14) The principle as to the necessity for such assignment is well ascertained; the difficulty lies in the application: *Ford* v. *Foster.* (15)

Younger, K.C., replied.

(1) (1891) 8 Rep. Pat. Cas. 181.
(2) [1896] 2 Ch. 136.
(3) (1886) 32 Ch. D. 213.
(4) (1882) 7 App. Cas. 219, 226.
(5) (1895) 13 Rep. Pat. Cas. 1.
(6) [1894] A. C. 275.
(7) (1901) 18 Rep. Pat. Cas. 434.
(8) [1901] 2 Ch. 513.
(9) (1861) 2 J. & H. 139.
(10) (1872) L. R. 7 Ch. 611, 628.
(11) (1887) 36 Ch. D. 740, 759.
(12) (1878) 9 Ch. D. 176.
(13) [1894] A. C. 275, 279.
(14) (1857) 3 K. & J. 423.
(15) L. R. 7 Ch. 611, 624.

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The judgment of their Lordships was delivered by

LORD ROBERTSON. Their Lordships are of opinion that the respondents, the plaintiffs in the suit, ought to have been non-suited for want of title, and that the appeal must therefore be allowed.

The grounds of this conclusion may be very shortly stated.

The action is for breach of trade mark in Hong Kong, and the trade marks founded on originated with persons named Bovet, and were used by them in their business at Hong Kong as dealers in watches. That Hong Kong business, of selling watches to the public, belongs now, not to the respondents, but to a certain Madame Bovet, and the relation in which the respondents stand to Madame Bovet is simply that of manufacturers to a customer. Accordingly the only watches which they sell at Hong Kong they sell to Madame Bovet, and with those sales to her their business in Hong Kong begins and ends. It results that the only person who could be deceived, so far as they are concerned, is Madame Bovet, and that is not their case at all. Their case consists in ignoring the contractual relation (of manufacturers to dealer) by which they are connected with, and are separated from, Madame Bovet, and identifying themselves with the trade which belongs to her and with which, by family as well as by business interest, they are connected.

With the trade marks themselves they have a much more direct connection, for they hold an assignment from the trustee in bankruptcy of some former Bovets, which, if paper would do, apart from business, might give them a good enough title. But it is trite law (now embodied in statute, as regards registered trade marks) that an assignment of trade mark, without the business, confers no effective right. It has been suggested indeed by the Chief Justice that the following words in the assignment support the title: "avec l'entreprise dont elles [the trade marks] servent à distinguer les produits." But these general words occur in an assignment executed in Switzerland and must be applied by evidence to Hong Kong; and, unfortunately, the evidence proves that in Hong Kong the business, on the incidents of which and injuries to which the respondents rely, is de facto not theirs and is not carried on for them.

About these facts there is no ambiguity or doubt at all. Mr. Heerman, of Messrs. Gaupp & Co., who act for the plaintiffs, on the one hand, and Madame Bovet, on the other, are perfectly explicit on the point.

It was argued for the respondents that the trial had been so conducted that this point of title was not now open to the appellants. But, on the pleadings, the appellants expressly stated that they did not admit the averments of title and then lay by. In such a situation a plaintiff, if he ignores the question, does so at his peril, for the defence puts him to prove his title. Fortunately, however, the matter is not left to be determined on a mere question of pleading, for the evidence at the trial and the additional evidence taken during the hearing of the appeal place the question on a clear footing of ascertained fact.

It was in the end courageously maintained for the respondents that they, in their quality of manufacturers, had sufficient interest to sue the action. No authority supports this contention, and it is against principle. It is quite true that the respondents are interested in the success of Madame Bovet's business, but this can never put them in her shoes in vindicating her rights against wrong-doers.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed, the judgments below discharged, with costs, and the plaintiff nonsuited. The respondents must pay the costs of the appeal.

Solicitors for appellants: *Wadeson & Malleson.*
Solicitors for respondents: *Sharpe, Pritchard & Co.*

[PRIVY COUNCIL.]

J. C.*
1908
June 25 ; *July* 2, 16.

In re THE WILL OF WI MATUA, DECEASED.
PETITIONS BY REARDON AND TE PAMOA.

ON APPEAL FROM THE NATIVE APPELLATE COURT OF NEW ZEALAND.

New Zealand Act 58 *Vict., No.* 43, *s.* 93—*Judgment final and conclusive—Prerogative not taken away except by express Words—Special Leave to Appeal.*

Sect. 93 of New Zealand Act 58 Vict., No. 43, declares that the decisions of the Native Appellate Court established thereby shall be "final and conclusive," but does not expressly exclude His Majesty's prerogative :—

Held that, the legal rights subjected to the said Court being rights in the matters of land, succession, and probate, an appeal would have lain to His Majesty if the said Court had not been established and could not be taken away except by express words.

Théberge v. *Laudry*, (1876) 2 App. Cas. 102, and *Cushing* v. *Dupuy*, (1880) 5 App. Cas. 409, distinguished.

THESE were petitions by C. W. Reardon and Te Pamoa for special leave to appeal from a judgment of the above Court dated July 4, 1907. They alleged a will of Wi Matua dated February 28, 1903, his death on September 17 in the same year, refusal of probate by the Native Land Court on August 24, 1906, to the executor C. W. Reardon, and dismissal of an appeal therefrom by the Native Appellate Court on July 4, 1907. The judgments were to the effect that the alleged will was not duly proved. On the argument,

Hume Williams, K.C., for the caveators, objected that s. 93 of the Act 58 Vict., No. 43, declared that the decisions of the Native Appellate Court should be final and conclusive. The Court was established with a special jurisdiction, and the intention was that there should be no appeal. The jurisdiction no doubt related to ordinary subjects of litigation, but the policy of the Act was to determine disputes amongst natives according to

* *Present:* LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

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their own customs with expedition and finality. Reference was made to *Cuvillier* v. *Aylwin* (1); *Reg.* v. *Eduljee Byramjee* (2); *Reg.* v. *Stephenson* (3); *Théberge* v. *Laudry* (4); *Cushing* v. *Dupuy* (5); *Moses* v. *Parker.* (6)

Northcote, for the petitioners, contended that the prerogative had not been taken away by express words, and that on the merits the application should be granted.

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The judgment of their Lordships was delivered by

LORD ROBERTSON. In 1894 a Native Appellate Court was set up in New Zealand, the already existing Native Land Court being expressly continued. To these Courts the Legislature has given exclusive jurisdiction over the civil rights of natives in land and in matters of succession, probate, and administration. The object of the legislation was to provide for the determination of disputes among those natives according to their own customs, so far (to use the words of an earlier Imperial statute, 15 & 16 Vict. c. 72) as these "are not repugnant to the general principles of humanity." The 93rd section of the Act of 1894 (No. 43 of 58 Vict.) declares that the decisions of the Native Appellate Court shall be "final and conclusive." There is no express exclusion of His Majesty's prerogative. The question now raised by the caveators is whether the words of the section exclude a petition to His Majesty for leave to appeal. The litigation was in the region of probate.

The rule applicable to such cases has been clearly stated in *Théberge* v. *Laudry* (4) as quoted and approved in *Cushing* v. *Dupuy* (7): "Their Lordships wish to state distinctly that they do not desire to imply any doubt whatever as to the general principle that the prerogative of the Crown cannot be taken away except by express words; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed precise words must be shewn to take away that prerogative."

(1) (1831) 2 Knapp, P. C. 72.
(2) (1846) 5 Moo. P. C. 276.
(3) (1847) 5 Moo. P. C. 296.
(4) 2 App. Cas. 102.
(5) 5 App. Cas. 409.
(6) [1896] A. C. 245
(7) 5 App. Cas. at p. 419.

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It has been argued that, inasmuch as the Native Appellate Court has a special jurisdiction, this sets its judgments apart and excludes review by His Majesty in Council. The whole virtue of this argument resides in the word "special," and in the supposed assimilation thereby effected to the two cases of *Théberge* v. *Laudry* (1) and *Cushing* v. *Dupuy*. (2)

The difference between those cases and the present is of the broadest and most essential kind. In them the subject-matter of the protected jurisdiction connoted functions conferred on the Court by statute which would not otherwise have belonged to it as the general distributor of justice. In the one case—*Théberge* v. *Laudry* (1)—the subject-matter was actually a part of the privilege of Parliament, and therefore entirely alien to the region of prerogative. In the other case the duties imposed on the Court were truly not judicial, but administrative, in their nature, and historically they had been originally vested in an administrative commission.

Turning to the present case, their Lordships have to deal with rights which are the ordinary legal rights of subjects of the King. The legal rights of this particular people in the matters of land, succession, and probate are subjected to the newly-created tribunal. But for the creation of this Court the Law Courts would have had to determine those rights as best they could, and an appeal would clearly have lain to His Majesty. The exclusion of the right to appeal to His Majesty would therefore be a forfeiture of existing rights on the part of Sovereign and subject.

On the merits of the petitions, however, their Lordships are of opinion that special leave to appeal ought not to be granted, and they will humbly advise His Majesty accordingly. The caveators having failed on the preliminary objection, which necessitated an adjournment of the hearing, there will be no order as to the costs of the petitions.

Solicitors for petitioners: *Snow, Fox & Higginson.*
Solicitors for respondents: *Blyth, Dutton, Hartley & Blyth.*

(1) 2 App. Cas. 102. (2) 5 App. Cas. 409.

[PRIVY COUNCIL.]

FULTON . . . . . DEFENDANT;

AND

NORTON . . . . . PLAINTIFF.

J. C.*
1908
July 9.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British Columbia Crown Procedure Act, s. 4—Statutory Duty to submit Petition of Right—Damages for Breach must be assessed by a Jury.

Under the British Columbia Crown Procedure Act, s. 4, it is the duty of the Provincial Secretary to submit to the Lieutenant-Governor a petition left with him as therein directed for that purpose. His definite refusal to do so gave the petitioner a cause of action involving damages which must be submitted to a jury.

APPEAL from a judgment of the Supreme Court (June 24, 1907) reversing a judgment of the Full Court of British Columbia (January 21, 1907) which had affirmed the judgment of Morrison J., who held that there was no evidence to go to the jury and dismissed the respondent's action.

The appellant, a member of the Executive Council of the Province of British Columbia in the Dominion of Canada, held at the material dates the office of Provincial Secretary for the said Province.

On January 24, 1906, the respondent, being the holder of a special timber licence which entitled him to cut, fell, and carry away the timber upon a certain tract of land in the Province, applied to the Chief Commissioner of Lands and Works for a renewal thereof under the Provincial Land Act Amendment Act, being 5 Edw. 7, c. 33. This application, having come before the said Chief Commissioner, was refused.

On April 24, 1906, the respondent left with the appellant a petition of right by way of appeal from this refusal as provided by the Crown Procedure Act (R. S. B. C. c. 57), s. 4, which is as follows:—"The said petition shall be left with the Provincial Secretary in order that the same may be submitted to the Lieutenant-Governor for his consideration and in order that the Lieutenant-Governor

* *Present:* LORD LOREBURN L.C., LORD ROBERTSON, LORD ATKINSON, SIR ARTHUR WILSON, and SIR HENRI ELZÉAR TASCHEREAU.

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if he shall think fit may grant his fiat that right be done; and no fee or sum of money shall be payable by the suppliant on so leaving such petition or upon his receiving back the same."

On May 2, 1906, the appellant brought this petition before the Executive Council for the Province, and on the same day, pursuant to its decision, notified the respondent through his solicitors that the Council did not see their way to recommend that the fiat be granted.

On the 4th of the same month the appellant wrote formally declining to submit the petition to the Lieutenant-Governor.

Thereupon the respondent sued to recover 10,000 dollars for breach of statutory duty by the appellant, who before defence obtained the Lieutenant-Governor's refusal of the fiat and then paid five dollars into Court with a denial of liability. Morrison J. ruled that there was no evidence to go to the jury and dismissed the action. The Full Court (Irving J. dissenting) affirmed the dismissal. The Supreme Court (Davies and Maclennan JJ. dissenting) directed a new trial with all costs. The majority held that the section cited above created a duty to the appellant enforceable by action, and, further, that though the petition was presented and no actual damage was suffered, yet a jury might give substantial damages in respect of the breach of duty revealed in the letter of May 4, 1906.

The Chief Justice (with whom Duff and Idington JJ. concurred) said: "The payment into Court of a nominal sum does not seem to me to mend matters. . . . . I will not affirm that as a matter of course and as settled law, a neglect to submit a subject's petition by a representative of the Crown is to be covered by a tender of five dollars. . . . . The case ought to be tried out and properly tried out. To maintain the proposition that a Minister of the Crown can be so protected in disregarding the statute seems to me equivalent to repealing it. The result, if the petition had been properly dealt with, is something we can say nothing about. . . . . It is peculiarly a case for a jury to assess damages in, if they come to be assessed. A direction to assess only nominal damages would have been an error, and much more grave is the dismissal of the action without going through even the form of finishing the trial."

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Sir R. Finlay, K.C., and *Rowlatt*, for the appellant, contended that the judgment of the Supreme Court should be reversed because the appellant had substantially complied with the requirements of the Crown Procedure Act, s. 4. He had performed his statutory duty thereunder in that he had submitted the petition of right within a reasonable time after it had been left for submission. Even if the refusal in the first instance, which, however, had not been persisted in, involved a technical breach of duty on the appellant's part, no action lies therefor without actual damage, and none was shewn to have been sustained by the respondent. It ought to be assumed in his favour that had it been presented at once the Lieutenant-Governor would have acted then as he did later, and as it was his duty to act, on the advice of his Executive Council, and the petition would have been refused. Reference was made to *Irwin* v. *Grey* (1); *Tobin* v. *Reg.* (2)

Lafleur, K.C., and *W. S. Deacon*, for the respondent, were not heard.

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The judgment of their Lordships was delivered by

LORD LOREBURN L.C. Their Lordships think that a cause of action arose in this case upon the definite refusal of the defendant (the appellant), in the letters of May 2, 1906, and May 4, 1906, to submit the respondent's petition of right to the Lieutenant-Governor. The statute says that this is to be done, and says nothing as to the advice with which the petition is to be accompanied, if any advice is tendered. The cause of action involves some damages, if the jury think fit to award them—not those supposed to ensue from a refusal of the licence asked for (which are not relevant at all in this action), but such as a jury might think reasonably followed from the refusal to submit the petition, or, if the facts of the case admitted of the point being raised, from the conduct of the defendant. In the present case there appears no such ground as that last referred to. The judge will, no doubt, advise very great moderation in estimating the damages in this case. However unimportant the omission

(1) (1862) 3 F. & F. 635.
(2) (1863) 32 L. J. (C.P.) 216, 221, 222, which refers to the case in 3 F. & F.

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of the defendant to discharge his duty may seem, their Lordships do not think that the Court could take upon itself the function of the jury. The damages are not necessarily nominal.

Their Lordships will accordingly humbly advise His Majesty to dismiss this appeal. The appellant will pay the costs of it.

Solicitors for appellant: *Gard, Rook & Co.*
Solicitors for respondent: *Deacon, Deacon & Wilson.*

[PRIVY COUNCIL.]

J. C.* 1908 *July* 20.

RIEKEN . . . . . Appellant;

AND

JUSTICES FOR THE YORKE PENINSULA DISTRICT . . . . . Respondents.

KEAM AND OTHERS . . . . . Appellants;

AND

JUSTICES FOR THE ADELAIDE LICENSING DISTRICT . . . . . Respondents.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Rule absolute against Justices for Prohibition without Costs—Appeal does not lie as to Costs.

The Court, having made absolute a rule for prohibition at the instance of the appellants against the respondent justices, refused to order them to pay the appellants' costs:—

Held, an appeal did not lie. There had been no mistake of law, and the Court had exercised its judicial discretion.

Appeal in the first case from an order of the Supreme Court (December 19, 1906) making absolute without costs a rule calling on the respondents to shew cause why a writ of prohibition should not issue against their further proceeding to determine whether the publican's licence held by the appellant should

* *Present:* Lord Robertson, Lord Atkinson, Lord Collins, and Sir Arthur Wilson.

not be renewed. The appeal was only so far as the order did not direct the justices to pay the appellant's costs.

The respondents were a bench of justices appointed under the Licensed Victuallers Act, 1880, to be the licensing authority for the Yorke Peninsula licensing district. On a local option poll being taken for the local option district of Wallaroo a resolution was adopted to reduce licences from twenty-one to fourteen. The respondents called on the appellant to shew cause why his licence should be renewed. He objected that two of the twenty-one licences were not situate in the Yorke Peninsula district, but in a district over which the justices had no jurisdiction, and that, the Wallaroo district not being coterminous with the licensing district of the respondents, no lawful poll had been taken under which the respondents could act.

On the application for the said writ of prohibition the respondents admitted that the fact that the two districts were not coterminous was fatal and that they had no jurisdiction, but contended that the writ would not lie. The Court unanimously held that it would lie and made the rule absolute, intimating that in justice the Government which had indemnified the respondents against costs ought to pay the appellant's costs. A majority decided that they had no jurisdiction to order the justices to pay costs unless they had been personally guilty of misconduct, Gordon J. being of opinion that justices who, when their decision is impeached, adopt the attitude of active adversaries and ordinary litigant parties are liable to pay costs.

Consolidated appeals in the second case from four orders of the Supreme Court (December 19, 1906). The question decided therein was the same as in the first case.

Balfour Browne, K.C., *H. Avory*, K.C., and *Bodkin*, for the appellants, contended that the Supreme Court was wrong in holding that they had no jurisdiction to give costs unless the respondents were personally guilty of misconduct. Otherwise there had been misconduct in allowing themselves to be used as active litigants to support the illegal action of the authorities. They elected to become active adversaries of the appellant and put him to great expense by vexatiously resisting the issue of the

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writ of prohibition, knowing that the proceedings under the Local Option Act, 1905, were illegal, null, and void. Reference was made to *Reg.* v. *Goodall* (1); *Heywood* v. *Whitehead.* (2)

Danckwerts, K.C., and *Rowlatt*, for the respondents, contended that an appeal did not lie on a mere question of costs, that there was no misconduct by the respondents, and that in its absence costs ought not to have been given against them. Otherwise costs were in the discretion of the Court, which rightly abstained from ordering the respondents to pay the appellants' costs. Reference was made to *Reg.* v. *Justices of London* (3); *Inglis* v. *Mansfield* (4); *Yeo* v. *Tatem* (5); *Home* v. *Pringle* (6); *Wilson* v. *Reg.* (7); *Mussumat Keemee Baee* v. *Latchman Das Narain* (8); *Richards* v. *Birley.* (9)

Balfour Browne, K.C., replied.

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July 20.

The judgment of their Lordships was delivered by

LORD COLLINS. The question sought to be raised by these appeals is whether the Supreme Court of South Australia, in making absolute a rule for prohibition at the instance of the appellants—the relators—against the respondent justices, was justified in refusing to order the respondents to pay the appellants' costs.

The case was argued on both sides on the footing that the jurisdiction of the Australian Court over costs in prohibition is the same as that of the Courts having jurisdiction at home. The appellants contended that the Australian Court had virtually declined jurisdiction to award costs against the respondents by holding (by a majority) that they had no power to do so unless the respondents were personally guilty of misconduct, which the Court negatived. The respondents, on the other hand, contended that there had been no declining of jurisdiction on the part of the Court, but that they in fact merely exercised the jurisdiction conferred upon them by declining in their discretion to visit with costs justices who had, in the public interest, assisted the

(1) (1874) L. R. 9 Q. B. 557.
(2) (1897) 76 L. T. 781.
(3) [1894] 1 Q. B. 453.
(4) (1835) 3 Cl. & F. 362.
(5) (1871) L. R. 3 P. C. 696.
(6) (1840) 8 Cl. & F. 264, 293.
(7) (1866) L. R. 1 P. C. 405; S. C., 4 Moo. P. C. (N.S.) 307.
(8) (1837) 1 Moo. Ind. App. 470.
(9) (1864) 2 Moo. P. C. (N.S.) 96.

Court by instructing counsel in a matter of considerable difficulty to argue their view of the case.

The respondents further contended that the appeal was for costs only, and that this Board ought not to entertain it.

No doubt that rule is firmly established: *Wilson* v. *Reg.* (1) The rule is thus stated by Lord Brougham in *Inglis* v. *Mansfield* (2): "The rule with respect to costs in this House, as well as in the Privy Council and the Court of Chancery, is, that you cannot appeal for costs alone; but you can bring an appeal on the merits; and if that is not a colourable ground of appeal for the purpose of introducing the question of costs to the Court called upon to review the case, the Court of review will treat that, not as an appeal for costs, but will, in affirming the judgment given in the Court below, consider the question of costs as if it is fairly raised."

The rule is stated somewhat more favourably for the appellants in *Yeo* v. *Tatem* (3): "Where there has been a mistake upon some matter of law that governs or affects costs—some matter that involves the due application of principles of law—the party prejudiced is entitled to have the benefit of correction by appeal."

But even tried by this standard the cases now under appeal do not seem to their Lordships to involve a mistake in any matter of law. There was nothing amounting, in their opinion, to a declining of jurisdiction by the majority of the Court. They exercised jurisdiction by declining to visit with costs justices who, in their opinion, had done no more than their duty in instructing counsel to shew cause, and it is no argument against the soundness of that discretion that the course they took coincided with the practice which is usually followed in this country in such cases: see Short and Mellor, p. 229, ed. 1908.

Their Lordships will humbly advise His Majesty that the appeals ought to be dismissed. The appellants must pay the costs of their respective appeals.

Solicitors for appellants: *Gribble, Oddie, Sinclair & Johnson.*
Solicitors for respondents: *Freshfields.*

(1) L. R. 1 P. C. at p. 408. (2) 3 Cl. & F. at p. 371.
(3) L. R. 3 P. C. at p. 702.

[PRIVY COUNCIL.]

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FOONG TAI & CO. . . . . DEFENDANTS;

AND

BUCHHEISTER & CO. . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT FOR CHINA AND COREA AT SHANGHAI.

Admiralty Court Act, 1861, *s.* 5—*China and Corea Order in Council*, 1904, *s.* 100—*Necessaries supplied on Credit of Ship—Claim of Defendants as Purchasers of Ship.*

In an action in rem against a ship under s. 5 of the Admiralty Court Act, 1861, for necessaries supplied to B. on the credit of the ship, it appeared that the registered owners were trustees mainly for the defendants as purchasers who had paid to B. nearly the whole of the purchase-money before the necessaries were supplied, B.'s interest being to the extent of a small balance of purchase-money and subject to the obligation of delivery of the ship to the appellants according to his contract:—

Held, that the plaintiffs were entitled to recover. Their claim against the ship was paramount to that of the defendants for the delivery thereof under their contract with B.

APPEAL from a decree (January 10, 1907) of the Supreme Court in an action brought by the respondents against the steamship *Draco*.

The action was an action in rem under s. 5 of the Admiralty Court Act, 1861, as applied to Shanghai by s. 100 of the China and Corea Order in Council, 1904, and s. 2, sub-ss. 2 and 3 (*a*), of the Colonial Courts of Admiralty Act, 1890, and was commenced on September 22, 1906. The respondents by their amended writ claimed 2700*l.* with interest for repairs, disbursements, and necessaries at English ports, and at Port Said, Aden, Colombo, Singapore, Hong Kong, and Shanghai.

The appellants, as parties interested in the said steamship, intervened as defendants on October 9, 1906, and by their amended defence, dated November 20, 1906, pleaded, inter alia, that the alleged equipment and repairs were not necessaries;

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, SIR J. H. DE VILLIERS, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

that the claim was not a claim for necessaries within s. 5 of the Admiralty Court Act, 1861, or a claim giving a right of action in rem or at all; that the alleged necessaries were not supplied on the credit of the vessel or of the beneficial owner, but upon the personal credit of Messrs. Palmer & Co., of London, an English firm who were the respondents' agents or of the respondents; and that the appellants were induced to enter into the contract for the purchase of the vessel by the respondents' representation that she would be delivered to them in Japan free of all charges and expenses.

Palmer & Co. were transferees in England under a bill of sale on January 28, 1906, of the *Draco* and became her registered owners. Baessler was the beneficial owner, having supplied the purchase-money with funds advanced by the respondents. But on January 3, 1906, he sold his beneficial interest at an advanced price to the appellants, to the knowledge of the respondents, and repaid out of the purchase-money the sums advanced by the respondents. The respondents financed the ship on her voyage from England to Shanghai on the credit of the ship. Their disbursements were made after the appellants had paid 6000*l.* in respect of their purchase, leaving a balance of 250*l.* to be paid on delivery.

The question decided was whether the respondents' claim for necessaries, without which the ship could not have reached the port where she was to be delivered to the appellants, had priority over the claim of the latter under their contract of purchase.

The Court held that, though Palmer & Co. were registered owners of the *Draco*, they were at the time of the institution of the action bare trustees, and that though the appellants as purchasers had equitable claims in the nature of a contract of sale without a conveyance, of which claims it found the respondents had notice, yet the beneficial and equitable owner at that time was John Baessler; that Baessler was not domiciled in China; and that under those circumstances an action in rem would lie under s. 5 of the Admiralty Court Act, 1861. Then, after finding that credit was given by the respondents, not to Baessler, but to the ship, the Court held that some of the items included in Messrs. Palmer & Co.'s drafts on the respondents,

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and of the disbursements at Shanghai, were in the nature of necessaries chargeable against the ship, and referred to the registrar to inquire and report which of them were in fact necessary, and what amount should be allowed in respect of them, after due allowance for freights earned. No question was raised as to the amount reported.

Hamilton, K.C., and *Mansfield*, for the appellants, contended that on the evidence the respondents' claim was not for necessaries supplied to the ship, but for a balance of an ordinary mercantile account between the respondents and Baessler. It was not suggested that any of the respondents' disbursements had been made on the credit of the appellants, or that the appellants were their debtors for any of them or had incurred any personal liability in respect thereof. It was not shewn that they had been made on the credit of the ship. There was no maritime lien for these claims, and in the absence of a lien the action in rem must fail, unless at the time of its institution the ship was the property of the debtor, that is, of Baessler. At that time Palmer & Co. were the legal owners of the ship, and the appellants were the equitable owners, subject to the payment of a small balance of the purchase-money; and both the appellants and Baessler were domiciled in China within the meaning of the Admiralty Court Act, 1861, as applied by the Order in Council. The respondents, owing to the nature of their transactions regarding this ship, ought to be treated as parties to the agreement for its sale to the appellants; and it was inequitable under the circumstances to allow the respondents to enforce this claim against the ship in derogation of the appellants' rights under their agreement for purchase. Reference was made to *The Onni* (1); *The Comtesse de Frègeville* (2); *The Rio Tinto* (3); *The Heinrich Björn* (4); *The Two Ellens.* (5)

Scrutton, K.C., and *F. D. Mackinnon*, for the respondents, contended that the evidence amply sustained the finding of the

(1) (1860) Lush. 154.
(2) (1861) Lush. 333.
(3) (1884) 9 App. Cas. 356.
(4) (1883) 8 P. D. 151; (1885) 10 P. D. 44; (1886) 11 App. Cas. 270, 277.
(5) (1872) L. R. 4 P. C. 161.

Court that the respondents did not give credit to Baessler, but looked to the ship as their security. All the items in respect of which the Court has allowed the claim are matters which a prudent owner would, if present, have ordered for the ship and voyage, and are therefore necessaries within 24 Vict. c. 10, s. 5: see *The Riga.* (1) The expenditure defrayed by the respondents was in the nature of salvage expenditure incurred in the interest of the appellants, to whom the ship substantially belonged. If the respondents had not made these advances the ship would never have reached Shanghai. Under those circumstances it would be inequitable to postpone the paramount claim of the respondents over the ship to the claim of the appellants under their contract, the value of which had, in fact, been preserved to them by the expenditure of the respondents. As regards the accounts in this case, there was nothing in them which shewed any intention to look to Baessler alone for repayment and to abandon the claim on the ship. Reference was made to *The Onni* (2); *The Anna* (3); *The Underwriter* (4); *The Perla.* (5)

Hamilton, K.C., replied.

1908
July 20.

The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a decree, dated January 10, 1907, of the Supreme Court for China and Corea, in a suit in which the respondents, a German firm carrying on business at Shanghai, were plaintiffs, and the appellants, a Japanese firm carrying on business at Kobe, in Japan, and also at Shanghai, were defendants.

The action out of which the appeal arises was an action in rem brought against a steamship named the *Draco* under the provisions of s. 5 of the Admiralty Court Act, 1861, as applied to Shanghai by s. 100 of the China and Corea Order in Council, 1904, and s. 2, sub-ss. 2 and 3 (*a*), of the Colonial Courts of Admiralty Act, 1890, to recover a sum of 2750*l.* with interest for necessaries, i.e., for repairs done to, stores and equipment provided for, and disbursements made on account of the above-mentioned

(1) (1872) L. R. 3 A. & E. 516.
(2) Lush. 154.
(3) (1876) 1 P. D. 253.
(4) (1868) 1 Asp. 127.
(5) (1857) 1 Swa. 230.

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vessel at certain ports in England, at Shanghai, and at Port Said, Aden, Colombo, Singapore, and Hong Kong, at which latter ports she called on a voyage from Cardiff to Shanghai.

The writ was issued and served on September 22, 1906. The ship was arrested by the Marshal of the Court on November 14, 1906, and released on April 2 following.

The ship not having been arrested till after the institution of the suit, s. 4 of the Act of 1861 does not apply. Sect. 5, however, confers on the High Court of Admiralty jurisdiction "over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it be shewn to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales." Sect. 10 gives the Court jurisdiction over, amongst other things, any claim of the master of any ship for wages earned on board of her, and for disbursements made on her account. By s. 8 the Court is empowered to decide all questions arising between co-owners or any of them touching the ownership, possession, or employment, or the earnings of any ship registered at any port in England or Wales "or any share thereof," and to "settle all accounts outstanding . . . . in relation thereto," and to "direct the said ship or any share thereof to be sold" and to "make such order in the premises as to it shall seem fit." Sect. 35 provides that the jurisdiction conferred by the Act may be exercised either by proceedings in rem or by proceedings in personam.

The expenditure in respect of which the plaintiffs claimed to recover may be divided into three heads, according as it took place in England, or at Shanghai, or at the intervening ports of call already mentioned. The disbursements in England were made by Messrs. Palmer & Co. direct; those at ports of call were made by the captain's drafts on Messrs. Palmer & Co., which drafts were duly met. Messrs. Palmer & Co. in turn rendered accounts of both these classes of disbursements, and drew on the plaintiffs for the amount thereof, after giving credit for advances on account of freight. The Shanghai disbursements were made by the plaintiffs direct.

The contentions put forward at the trial on the part of the

defendants were apparently: 1. That the plaintiffs' claim was not in reality a claim for necessaries within the meaning of s. 5 of the Act of 1861, but merely a claim for the balance of an ordinary mercantile account. 2. That there being no maritime lien for necessaries, a suit in rem could not be maintained under that section, unless at the time it was instituted the "res" proceeded against belonged to a person or to persons personally liable to the plaintiffs in that suit as a debtor or debtors in the sum sought to be recovered. 3. That owing to the relations inter se of the several parties concerned in the transactions connected with this ship, and to the notice and knowledge which the plaintiffs had of the defendants' equitable interest in, or claim upon, her, before any of these disbursements were made, it would be inequitable to enforce the plaintiffs' claim against the ship to the prejudice of this interest of the defendants.

The learned judge who presided at the trial held that these contentions were not sustained, and that the plaintiffs were entitled to recover under s. 5 for necessaries. He referred it to the registrar and merchants to inquire and report which, amongst the several items charged for, were necessaries, and what was the reasonable and proper amount to allow in respect of these. The registrar reported that the proper amounts to allow, after making all deductions and allowances, were 1117*l.* 8*s.* and $1830.85. Upon a motion to the learned judge to vary these amounts an addition of 102*l.* 5*s.* was made to them, and a sum of 52*l.* 8*s.* 1*d.* was referred to the registrar for consideration. In the present appeal their Lordships have not to consider the propriety or sufficiency of the amounts thus found in the plaintiffs' favour.

The facts are somewhat complicated, and, so far as material, are as follows.

One John Baessler, a German subject, who carried on at Shanghai the business of shipbroker, and was, in the opinion of the plaintiffs, a man living from hand to mouth, to whom nobody acquainted with him would give credit, in the month of December, 1905, desired to purchase from Messrs. T. Wilson, Sons & Co., the well-known shipowners of Hull, a steamship belonging to them, registered of that port, named

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the *Draco*. He was not acquainted with Wilson & Co., and for that reason, as well, perhaps, as because of his financial position, he approached the defendants and requested them to act as his agents in procuring through Palmer & Co., of London, the purchase of this ship. He also, according to the statement contained in his affidavit of October 12, 1906, employed them as his "agents" to finance the ship on her voyage from England to Shanghai. This the defendants agreed to do on receiving 2½ per cent. commission on the purchase-money of the ship. No formal agreement was drawn up, but divers letters and telegrams passed between the several parties concerned, with the result that the *Draco* was on December 30, 1905, purchased by Palmer & Co. from Wilson & Co. for the sum of 5000*l*. Baessler, on January 12, 1906, paid to the plaintiffs 4000*l*., part of the price of the vessel, and on February 3 paid 1000*l*., the balance. These sums were immediately on receipt transmitted by the plaintiffs, by wire, to Palmer & Co., and by the latter paid over to Wilson & Co., who, having received the price of the vessel from the firm with which alone they dealt, by bill of sale, dated January 20, 1906, transferred her to them.

Palmer & Co. thus became the registered owners of the *Draco*, and she remained a British ship, registered, as theretofore, as of the port of Hull.

If matters had rested there, Palmer & Co. would, in equity, have been mere trustees of the ship for Baessler, her beneficial owner. Any complication that has arisen in the case is due to the fact that on January 3, 1906, Baessler had, to the knowledge of the plaintiffs, entered into an agreement in writing with the defendant firm, who purported to act as agents for some undisclosed Japanese principals, for the sale to them of the same ship, the *Draco*, for the sum of 6250*l*., of which 6000*l*. was to be paid on the signing of the agreement, and the balance, 250*l*., on the ship's arrival at Kobe, in Japan, where Baessler was bound to deliver her in the month of March or April, 1906.

This agreement is signed by R. Tatlock (an assistant in the plaintiffs' firm) "per pro Buchheister and Company, Limited." Some controversy arose at the trial as to whether the signature of Tatlock was attached before or after that of the defendants.

It is not a matter of importance, as Hsi Chung Yu, one of the two partners composing the defendant firm (one residing at Shanghai and the other at Kobe), stated in his evidence at the trial that he knew "Baessler was going to treat through Buchheister for the purchase of the ship," that he had himself "no direct negotiations with Buchheister" about the ship, and that he "left it to Baessler." And Baessler himself deposed that he informed the defendants that he was transacting the business through Buchheister & Co., that they were acting as his agents in the transaction, and that this was the reason why the defendants asked to have the contract witnessed and signed by Buchheister & Co. He also stated that "Buchheister signed as security to them," and that "No doubt they (the plaintiffs) knew who the purchaser was."

On January 8, 600*l.* was paid by the defendants to Baessler; on the 12th, 4000*l.*; on February 2, 1400*l.*, making 6000*l.* in all. And there can be little doubt that the whole of the second payment and 1000*l.*, part of the third, were paid over by Baessler to the plaintiffs on January 12 and February 3 respectively, the remaining 1000*l.* being applied by him to his own purposes. On September 18 Baessler had drawn up a document, marked A, in which he had estimated approximately the expenses of the ship on her voyage from England to Shanghai at 2385*l.* He shewed this document to Tatlock before the latter agreed to bring out the ship. No doubt at that time Baessler hoped and expected that the vessel would earn on the voyage freight to the amount of about 3000*l.*, sufficient, as he thought, to meet her expenses; but from the telegrams which passed it is perfectly clear that even before the ship was purchased these hopes had proved delusive. To use Baessler's own words, they "had to take any freight to bring the ship out to China," and ultimately the *Draco* had to be chartered to carry a cargo of coals from Cardiff to Singapore, at a freight which only amounted to about 1440*l.*, four-fifths of which was to be paid in England. Before the vessel ever set sail on February 21, 1906, a sum of 1076*l.* 8*s.* 7*d.* had been expended on her account, leaving only a balance of the freight of between 300*l.* and 400*l.* to meet the subsequent expenses of the voyage to Singapore. Yet the plaintiffs paid,

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apparently without murmur and without demanding any payment or security from Baessler, four drafts of the captain drawn at Port Said, Aden, Colombo, and Singapore respectively, for four sums amounting in the aggregate to 1661*l.* 1*s.* 6*d.*

It is scarcely conceivable that any commercial man of ordinary intelligence would, for a commission of 125*l.*, advance sums such as these on the personal credit of a person in Baessler's position. Mr. Tatlock stated in his evidence that his firm always looked to the steamship as security, that no one would give credit to Baessler, and that they regarded the business as safe because they had the steamer in hand. The trial judge who saw the witness believed him. Their Lordships see no reason to disagree with the conclusion at which the judge arrived.

It is not disputed that necessaries, within the meaning of s. 5 of the Act of 1861, are such things as the owner of a vessel, as a prudent man, would have ordered, had he been present at the time they were ordered, as being fit and proper for the service on which the vessel was engaged: *Webster* v. *Seekamp* (1); *The Riga* (2); nor that some, at all events, of the things supplied to this ship at the several ports were prima facie of the character of necessaries. If so, the quantum is not a matter for consideration on this appeal.

It cannot be questioned that the cases of *The Rio Tinto* (3) and *The Henrich Björn* (4), amongst others, establish that the person who pays for necessaries supplied to a ship has, as against that ship and her owners, as good a claim as the person who actually supplied them, and, further, that he who advances money to the person who thus pays, for the purpose of enabling him to pay, stands in the same position as the person to whom the money is advanced. The plaintiffs, therefore, on the facts found, stand in the position of one who has supplied necessaries to a ship on the credit of the ship.

That, no doubt, does not give them any maritime lien for the sums so advanced, or any rights against the ship till action brought: *The Rio Tinto* (3); *The Henrich Björn*. (5) But, having

(1) (1821) 4 B. & Ald. 352.
(2) L. R. 3 A. & E. 516.
(3) 9 App. Cas. 356.
(4) 10 P. D. 44.
(5) 11 App. Cas. 270.

regard to the wide words of the above-mentioned sections of the Act of 1861, it by no means follows that they cannot sue in rem to recover these advances unless, as is contended, they are at the same time in a position to sue at law in personam for the same sums every person having a proprietary interest in equity in the ship.

The position of the defendants in the present case is entirely different from that of the defendants in any of the authorities cited, for, though the plaintiffs could have sued Baessler in personam on his contracts for the sums they expended, the liability of the ship, in this case, does not at all depend upon the existence of any maritime lien in the ordinary sense, so much as on the effect of the transactions which took place between the several parties concerned on their respective proprietary rights and interests to and in the ship.

This effect was, in equity, in their Lordships' opinion, to transfer to the defendants, subject to the agreement, almost the whole of Baessler's beneficial interest in the ship, and to make them joint beneficial owners of her with him, Palmer & Co. being trustees for both, not for Baessler alone.

As on February 3, before any of the expenditure which the plaintiffs seek to be repaid, other than some three or four insignificant items, had taken place, Baessler had been paid by the defendants 6000*l.* of the stipulated price of 6250*l.*, all but a remnant of his beneficial interest in her had in equity passed to them.

The defendants could not sell the ship without the concurrence of Palmer & Co. and Baessler. Their own interest in her, though valuable, was not of a very marketable kind. It was in Japan she became valuable to them. It was there they desired to have her brought. To bring her there without the provision of adequate necessaries was impossible. Baessler, apparently, could not or would not provide them. He swore, in effect, that he had appointed the plaintiffs to do that. If provided at all they must have been provided by the plaintiffs or by the defendants themselves. The expenditure incurred in respect of them, so far as it was reasonable and proper, was, therefore, quoad the defendants, in the nature of salvage expenditure incurred in

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their interest, to protect their property, and so enhance its value to them. There can be little doubt that the defendants could have instituted a suit in Shanghai in any Court having equitable jurisdiction, if such there be, to have it declared that almost all the beneficial interest of Baessler in the ship had passed to them, and possibly that, on their taking delivery of the ship at that port, the balance of the purchase-money should, pro tanto, be set off against their claims against Baessler for damages, that he should be directed to transfer to them the residue of his interest in the ship, and that Palmer & Co. should be directed to perfect the defendants' title by executing a formal transfer, or bill of sale, of the ship to them. Sect. 8 of the Act of 1861 seems to confer on the High Court of Admiralty a jurisdiction wide enough to enable it to deal with such a suit between co-owners beneficially interested, but it scarcely admits of question that, if such a suit were instituted before a tribunal competent to entertain it, the plaintiffs in this action would be allowed to intervene, and the relief prayed for would only be granted on the terms that they should be repaid the expenditure incurred by them in providing those necessaries without which the ship could never have reached Shanghai at all. Their Lordships are therefore of opinion that there is no reason why the plaintiffs' claim for the money so advanced on the credit of the ship, so far as it was employed to procure necessaries for her voyage reasonable and proper in character and amount, should, in this action, be postponed to the defendants' claim on the ship under the agreement, and that the second and third contentions put forward by the defendants at the trial cannot be sustained.

It remains to consider the first contention, namely, this—that the plaintiffs sue, not for necessaries, but for the balance of an ordinary mercantile account. The accounts furnished to Baessler are printed in the record from pages 9 to 21, both inclusive. They are solely concerned with one ship, the *Draco*, and with disbursements made for her in one adventure, her voyage from Cardiff to Shanghai. Those dealing with expenditure at the several ports of call and at Shanghai do not contain a single credit item. They are little more than lists of items of disbursements. It is only in account A—the account

dealing with the expenditure in England before the vessel sailed—that credit items are to be found and a balance is struck. Two of these credit items are for sums of 4000*l.* and 1000*l.*, obviously the purchase-money of the ship received and paid over before any expenditure had been incurred. The remaining credit item is 813*l.* 13*s.* 6*d.* (four-fifths of the freight to Singapore) paid in England on February 23, less deductions, leaving a balance of 414*l.* 13*s.* 8*d.*, which balance the plaintiffs paid Palmer & Co. No accounts, therefore, have been rendered in this case which in fact resemble ordinary mercantile accounts. But on an examination of the authorities to which their Lordships have been referred, and especially of the cases of *The Twentje* (1) and *The Underwriter* (2), it will be found that what they really decide is this—that, as necessaries supplied to a ship are prima facie presumed to have been supplied on the credit of the ship, and not solely on the personal credit of her owners (*The Perla* (3)), the form in which accounts are rendered by an agent, who has supplied or paid for necessaries, to his principal is evidence to rebut that prima facie presumption and shew that the agent looked for payment to the principal alone. There is nothing in the Act of 1861 to prevent an agent from suing for necessaries under s. 5, nor is there any rule or principle of law that an agent loses his right so to sue if in the account he furnishes to his principal for those necessaries he gives credit for sums received. In the case of *The Underwriter* (2), the governing consideration on which the judgment of Phillimore J. in favour of the plaintiff turned was this—that there, as here, the suit was instituted, "not to recover any particular or selected item of a general account, but the whole of the sum expended upon this particular occasion in payment of the necessaries required by the exigencies of the ship and without which she could not have continued her voyage." Their Lordships think that the form in which the accounts were furnished in this case affords no evidence that the plaintiffs intended to look to Baessler alone for repayment of the large sums advanced by them, and that even if it did afford such

(1) (1859) 13 Moo. P. C. 185. (2) 1 Asp. 127.
(3) 1 Swa. 230.

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evidence, that evidence is outweighed by the other evidence in the case. They are therefore of opinion that the judgment appealed against was right, and should be affirmed, and this appeal dismissed. They will humbly advise His Majesty accordingly. The appellants will pay the costs of this appeal.

Solicitors for appellants: *Wadeson & Malleson.*
Solicitor for respondents: *A. P. Stokes.*

[PRIVY COUNCIL.]

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May 19; *July* 28.

LAWRENCE JOSEPH HARNETT . . . . . DEFENDANT;

AND

WILLIAM PATRICK CRICK . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Constitution Act of New South Wales No. 32, 1902, *s.* 15—*Validity of Standing Order of the Legislative Assembly—Power to suspend an Accused Member till Verdict—Order not punitive but preventive.*

A standing order of the Legislative Assembly of New South Wales made under the power given to it by Constitution Act No. 32 of 1902, s. 15, and approved by the Governor, empowered the House to suspend from the service of the House a member charged with an offence until a verdict given or further order:—

Held, that the standing order, being to regulate the orderly conduct of the Assembly, was within the terms of the power conferred. The House was sole judge as to the occasion requiring it; and a Court of law could not question its validity so long as it related to orderly conduct. Accordingly a suspension under it till verdict given of the respondent, who had been charged with a criminal offence, made with a view to defend the regularity of its proceedings and not by way of punishment, was enforceable against him.

APPEAL from a judgment of the Supreme Court (March 15, 1907) allowing a demurrer to the defendant's plea to an action for assault by removing the plaintiff (by direction of the Speaker)

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, SIR J. H. DE VILLIERS, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

from the Assembly Chamber of New South Wales pursuant to a resolution of the Assembly founded upon a standing order.

The question decided was as to the validity of the standing order, which is in these terms: "Whenever it shall have been ruled or decided (whether before or after the approval of this standing order) that the House may not proceed on a matter which has been initiated in the House affecting the alleged misconduct of a member because thereby the said member may be prejudiced in a criminal trial then pending on charges founded on such misconduct the House may suspend such member from the service of the House until the verdict of the jury has been returned or until it is further ordered."

It was passed in pursuance of Constitution Act, 1902, s. 15, which provides as follows:—Sect. 15: "(1.) The Legislative Council and Legislative Assembly shall, as there may be occasion, prepare and adopt respectively standing rules and orders regulating (*a*) the orderly conduct of such Council and Assembly respectively. . . . . (2.) Such rules and orders shall by such Council and Assembly respectively be laid before the Governor, and, being by him approved, shall become binding and of force."

The plea justified the trespass and grievance complained of under the direction of the Speaker. The demurrer denied the power of the Assembly to pass the standing order in question, as being retrospective, indefinite, and unnecessary.

The Supreme Court (Darley C.J. and Cohen J., Pring J. dissentiente) gave judgment for the respondent on the demurrer.

Sir R. Finlay, K.C., and *A. àBeckett Terrell*, for the appellant, contended that the Legislative Assembly had power to make the standing order pleaded by him. It had been approved by the Governor and was binding on the respondent and on all persons concerned. It was contended that the standing order and the resolution passed by the Assembly thereunder and the action of the Speaker and the appellant all related to and formed part of the internal proceedings and conduct of the Legislative Assembly as contemplated by the Constitution Act. The order was not punitive, and the period during which the resolution could operate was defined and was only that during which the

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Assembly was precluded from dealing with the matter affecting the respondent's conduct which was contained in the report of the Royal Commission. The Court could not entertain or decide the question whether the standing order was necessary or reasonable. The Assembly and the Governor were judges as to that. They referred to *Barton* v. *Taylor* (1); *Stockdale* v. *Hansard* (2); *Kielley* v. *Carson* (3); *Fenton* v. *Hampton* (4); *Dill* v. *Murphy* (5); *Speaker of Legislative Assembly of Victoria* v. *Glass* (6); *Kilbourn* v. *Thomson* (7); *Institute of Patent Agents* v. *Lockwood* (8); *Reg.* v. *Pharmaceutical Society.* (9)

Wise, K.C. (of New South Wales), and *C. Lacey Smith*, for the respondent, contended that the standing order was ultra vires. The Legislative Assembly had no inherent power to pass it. Its inherent powers were limited to protective and defensive measures necessary for the proper exercise of its functions and the conduct of its business. They did not extend to punitive measures in the absence of express statutory power in that behalf, but only to preventive measures. The power conferred by s. 15 of the Constitution Act is limited to secure the orderly conduct of the Assembly. The fact that a criminal charge is pending against the respondent does not affect or obstruct the course of business in the Chamber or relate to its orderly conduct. Sect. 34 of the Constitution Act relates to the conduct of members as distinct from the orderly conduct of business. This standing order, besides being punitive, is retrospective in its effect and provides an indefinite term of suspension. The resolution passed in pursuance of the order could not operate to justify the appellant or afford a defence to the action. *Barton* v. *Taylor* (1), it was contended, governed this case. Reference was also made to *Kielley* v. *Carson* (3); *Doyle* v. *Falconer* (10); *Speaker of Legislative Assembly of Victoria* v. *Glass* (6); *Fielding* v. *Thomas.* (11)

Sir R. Finlay, K.C., replied.

(1) (1886) 11 App. Cas. 197, 207.
(2) (1839) 9 Ad. & E. 1.
(3) (1842) 4 Moo. P. C. 63.
(4) (1858) 11 Moo. P. C. 347.
(5) (1864) 1 Moo. P. C. (N.S.) 487.
(6) (1871) L. R. 3 P. C. 560.
(7) (1880) 103 U. S. 168.
(8) [1894] A. C. 347.
(9) [1896] 2 I. R. Q. B. D. 368.
(10) (1866) L. R. 1 P. C. 328.
(11) [1896] A. C. 600.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The question in this case lies in a narrow compass. The respondent, a member of the Legislative Assembly of New South Wales, brought an action against the appellant, the Serjeant-at-Arms of the Assembly. The declaration stated that the defendant assaulted the plaintiff, ejected him from the House, and kept him ejected therefrom, whereby the plaintiff (as it was alleged) was prevented from attending to his duties, lost the benefit he would have derived from attendance, suffered pain of mind, and was injured in his good name and reputation. The declaration ended by claiming 2000*l.* by way of damages. The defendant put in a plea justifying his conduct. To this plea the plaintiff demurred.

The matters stated in the plea are shortly these: The plaintiff was Secretary for Lands in the State of New South Wales. A Royal Commission on the administration of the Lands Department found him guilty of misconduct in his office. On the publication of the report of the Royal Commission a resolution was moved in the Legislative Assembly in the words following:—"That this House do now proceed to consider so much of the report of the Royal Commissioner on the administration of the Lands Department as contains findings of misconduct against William Patrick Crick, Esq., now sitting as member of the Legislative Assembly for the electoral district of Blayney."

The Speaker ruled that the Assembly could not proceed on the matter, because the plaintiff might thereby be prejudiced in certain criminal proceedings founded on the report of the Royal Commission in which he was charged with corruption in his office by taking bribes from applicants for lands. Thereupon the House passed the following standing order, which was duly laid before the Governor and approved by him:—"Whenever it shall have been ruled or decided (whether before or after the approval of the standing order) that the House may not proceed on a matter which has been initiated in the House affecting the alleged misconduct of a member, because thereby the said member may be prejudiced in a criminal trial then pending on charges founded on such misconduct, the House may suspend such member from the service of the House until

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the verdict of the jury has been returned, or until it is further ordered."

After the standing order had been approved, the House passed a resolution to the effect that the plaintiff should be suspended from the service of the House until the verdict of the jury in the criminal trial then pending should be returned or until further order.

Notwithstanding this resolution, the plaintiff persisted in attending the House and claimed to take part in its proceedings. The Speaker called upon him to withdraw. He refused to comply with the Speaker's order, and then, by the Speaker's direction, the defendant removed him from the House.

In pursuance of an order of the Court that the issues of law be tried first, the demurrer came on to be heard before the Supreme Court in February, 1907. On March 15 following the Supreme Court, by a majority of two judges to one, ordered judgment to be entered for the plaintiff.

The only question argued before the Supreme Court, and the only question argued before this Board, was the validity of the standing order under which the plaintiff was suspended. The standing order was made in pursuance of powers vested in the Legislative Assembly by s. 15 of the Constitution Act No. 32 of 1902, which is a reproduction of s. 35 of 17 Vict., No. 41. The section, so far as material, is in the following words:—"The . . . . Legislative Assembly shall, as there may be occasion, prepare and adopt . . . . standing rules and orders regulating the orderly conduct" of the Assembly. "Such rules and orders shall . . . . be laid before the Governor, and being by him approved shall become binding and of force."

The learned Chief Justice, in whose opinion Cohen J. concurred, gave judgment allowing the demurrer. Pring J. was for upholding the plea.

The learned Chief Justice summed up the question under consideration in the following sentence:—"Has the Assembly, under the power given to it to prepare and adopt standing rules 'regulating the orderly conduct of the Assembly,' power to prepare and adopt a standing order, in the case of a member charged with an offence, which is to give the House power to

pass a resolution to suspend such member from the service of the House until a verdict has been returned, or until it is otherwise ordered—in other words, to make an order for indefinite suspension?"

In the result his Honour was of opinion "That the fact that a criminal charge is pending against a member of the Legislature in no way affects the course of business of the Chamber, is not in itself an obstruction to such business, and in no way affects or has any relation to the orderly conduct of the House."

Pring J. thought it difficult to see how the standing order in question could have any reference to the orderly conduct of the Assembly. So far he agreed with the learned Chief Justice. But his view was that the Governor's approval gave to the standing order the force of law and operated to prevent the Court from inquiring into its validity.

Their Lordships are not prepared to accept the reasoning on which Pring J. founded his judgment. They think that the provision in the Act as to the Governor's approval was not intended to have the effect of giving standing orders passed by the Assembly a validity which otherwise they would not have possessed. It seems rather to be a limitation on the powers of the Assembly, making the Governor's approval necessary for the validity of any standing order passed by that body under s. 15.

Their Lordships, however, think that the Supreme Court has not given sufficient weight to the peculiar circumstances of this case. No one probably would contend that the orderly conduct of the Assembly would be disturbed or affected by the mere fact that a criminal charge is pending against a member of the House. But in the present case there seem to be special circumstances which cannot be disregarded, and their Lordships feel compelled to take a different view of the situation from that which commended itself to the majority of the Supreme Court and to Pring J. so far as he was in agreement with the majority.

Two things seem to be clear: (1.) that the House itself is the sole judge whether an "occasion" has arisen for the preparation and adoption of a standing order regulating the orderly conduct of the Assembly, and (2.) that no Court of law can question the

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validity of a standing order duly passed and approved, which, in the opinion of the House, was required by the exigency of the occasion, unless, upon a fair view of all the circumstances, it is apparent that it does not relate to the orderly conduct of the Assembly.

The case was this: A member of the Assembly, a Minister of the Crown holding high office in the State, is charged by a Royal Commission with bribery and corruption. No graver charge can be made against a public man in his public capacity. The higher the position of the accused, the ranker the offence and the greater the scandal. The House proposes to deal with the matter, and to deal with it at once. The member incriminated had already been arrested and committed for trial on the charge laid against him by the Royal Commission. The Speaker interposes and rules that while the criminal charge is pending the Assembly cannot proceed to consider the report of the Royal Commission. With great forbearance the House acquiesces in the Speaker's ruling. The forbearance of the House meets with a return which was hardly to be expected. The accused insists on appearing in the House and taking part in the proceedings of the Assembly. It is not for this Board or any Court of law to pass an opinion on the line of action which the plaintiff chose to adopt. It may have proceeded from consciousness of rectitude and a singular devotion to the rights and interests of his constituents. It may have been a deliberate insult and challenge to the whole House. It is open to either construction. If the House itself has taken the less favourable view of the plaintiff's attitude, and has judged that the occasion justified temporary suspension, not by way of punishment, but in self-defence, it seems impossible for the Court to declare that the House was so wrong in its judgment, and the standing order and the resolution founded upon it so foreign to the purpose contemplated by the Act, that the proceedings must be declared invalid. The suspension (it may be observed) is not, as the Chief Justice appears to think, a suspension for an indefinite period. It enures only until a verdict be given in the criminal case or the House determines sooner to remove the suspension.

Their Lordships will humbly advise His Majesty that the

appeal should be allowed, the demurrer overruled, and the action dismissed with costs.

The respondent will pay the costs of the appeal.

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Solicitors for appellant: *Light & Fulton.*
Solicitor for respondent: *J. H. Galbraith.*

[PRIVY COUNCIL.]

JAMES DOUGLAS . . . . . PLAINTIFF;

AND

JOSEPH BAYNES . . . . . DEFENDANT.

J. C.* 1908 *June* 23, 24; *July* 27.

ON APPEAL FROM THE SUPREME COURT OF THE TRANSVAAL.

Contract of Sale of Land — Construction — Specific Performance refused — Uncertainty as to Consideration.

Held, that specific performance could not be decreed of a contract between the plaintiff and defendant by which the latter agreed to transfer to the former a farm in the Transvaal on which deposits of tin ore had been found in consideration of 3700 shares of 5*l.* each in a syndicate to be formed for the "purpose of developing" the same as a mining property, the 3700 shares to represent the appellant's holding in a syndicate of 12,000 shares.

The price to be paid by the plaintiff was wholly uncertain. It was to consist of shares in a syndicate whose purpose of development there was no evidence to define, either as to the nature and extent of the operations contemplated or as to what the parties meant by it, the value of the shares depending upon the adequacy of working capital which was neither ascertained nor ascertainable.

APPEAL from a decree of the Supreme Court (June 19, 1907) dismissing the appellant's suit for specific performance of a contract set out in their Lordships' judgment.

The questions decided were as to the true construction and effect of the contract, and whether under the circumstances stated in the said judgment it was capable of being enforced.

The Chief Justice of the Supreme Court based his judgment

* *Present:* LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

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upon the following grounds, namely, that the word "develop" in the contract between the parties meant "to prospect thoroughly"; that the syndicate contemplated by the contract was bound to have sufficient working capital to attain the objects for which it was called into existence; that the Solomon's Temple Developing Syndicate had not sufficient working capital, but that, on the contrary, 1000*l.* was entirely inadequate to prospect the farm properly. As to the alleged offer to find 7500*l.*, he held that no tender had been proved, that such offer was only an offer to compromise the action, and that the appellant had not shewn that he could have carried it into effect if it had been accepted by the respondent.

Danckwerts, K.C., and *Eustace Smith*, for the appellant, contended that the Court below was wrong in construing the contract between the parties to mean that the appellant thereby undertook to float a syndicate which should have sufficient working capital to thoroughly prospect the farm called Solomon's Temple. There was no term, express or implied, of the contract that the syndicate should have any specified amount of working capital, nor did it contemplate any particular mode of providing it. There was no provision that the required working capital should be raised by means of any share capital of the syndicate, or that any share capital should be reserved for the purposes of providing working capital. The syndicate had powers sufficient to provide working capital whenever it thought fit, and the appellant was not responsible for any course which it might adopt or neglect to adopt. He fulfilled his part of the contract by the tender of the 3700 shares and was entitled to call upon the respondent to fulfil his part. They referred to *Hamlyn* v. *Wood* (1) as to the implication of a term in a contract. It ought only to be made where it is necessary to give a transaction such efficacy as both parties must have intended it to have and to prevent such failure of consideration as cannot have been within the contemplation of either party.

Rufus Isaacs, K.C., and *A. G. Everitt*, for the respondent,

(1) [1891] 2 Q. B. 488.

contended that the syndicate whose shares were tendered was not a syndicate formed to develop the farm within the meaning of the contract. Its working capital was wholly inadequate for that purpose, and the offer to find a further 7500*l.* was, on the evidence, illusory and inadequate. The respondent was not bound to transfer his farm for 3700 shares in an undertaking of that character. The syndicate contemplated by the contract was one in which 8300 shares out of 12,000 should be unallotted in the first instance and be available for raising working capital; otherwise there were no means of raising it without seriously depreciating the shares tendered. But only 200 shares were reserved for that purpose, and in consequence the 3700 shares tendered formed a wholly insufficient consideration for the farm, essentially at variance with that contemplated by the contract.

Danckwerts, K.C., replied.

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July 27.

The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment of the Supreme Court of the Transvaal pronounced on June 19, 1907, dismissing the appellant's (plaintiff's) action.

The suit was instituted, in effect, to enforce specific performance of a certain agreement bearing date July 3, 1906, entered into between the appellant and the respondent (defendant), whereby the latter agreed to transfer to the former a farm called "Solomon's Temple," situate in the district of Waterberg, in the Transvaal, on which deposits of tin ore had been found, in consideration of 3700 shares of 5*l.* each in a syndicate to be formed for the "purpose of developing" the said farm as a mining property.

The relief prayed for was (1.) a transfer by the defendant of the said farm to the plaintiff against the delivery of the said 3700 shares which had been previously tendered to him by the latter; (2.) payment to the plaintiff of 50,000*l.* damages for breach of contract in the event of his failing so to do; and (3.) alternative relief.

The agreement is contained in the plaintiff's letter of July 3, 1906, duly accepted by the letter of the defendant of the following

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day, on the precise wording of which nothing turns. The letter of July 3, 1906, is in the terms following:—

"Nel's Rust,
"3rd July, 1906.

"Dear Mr. Douglas,

"Your letter of the 30th ult. reached me yesterday and I have considered your offer of 3700 (three thousand seven hundred) shares in a syndicate to develop 'Solomon's Temple,' these 3700 shares (three thousand seven hundred shares) to be in lieu of any payment for my farm 'Solomon's Temple' and to represent my holding in a syndicate of 12,000 (twelve thousand) shares.

"I have decided to, and hereby, accept the offer, and the previous arrangement under which you were to have the option on the farm from last May—for six months—starting at 15,000*l.* and rising a thousand pounds per month up to December, is now cancelled.

"Having accepted the offer, and now being a large shareholder in the syndicate, I expect the fullest confidence and that all information as to what is being done, the result of the prospecting, and what it is proposed to do, will be communicated to me.

"I cannot close without expressing disappointment that you have not given me a full third share in the syndicate as I consider that under the circumstances I am entitled to a third share—with which I would have been fully satisfied.

"Kindly acknowledge receipt of this letter.

"I remain,
"Yours faithfully,
"(Signed) Joseph Baynes."

By a memorandum of agreement dated October 8, 1906, between the plaintiff and one Duncan McCalman as trustee for a syndicate called "The Solomon's Temple Developing Syndicate, Limited," intended to be immediately registered in the Colony of Natal with limited liability, reciting the agreement so entered into between the plaintiff and the defendant, the plaintiff agreed to sell the farm of Solomon's Temple to the syndicate for 59,000*l.*, represented by 11,800 shares of 5*l.* each, 200 shares being reserved to provide working capital.

The syndicate was on the following day duly registered with limited liability under the limited liability laws of the Colony.

By the articles of association it was provided that the capital of the syndicate should be 60,000*l.*, divided into 12,000 shares of 5*l.*, of which 11,800 should be delivered to the vendors and promoters, and 200 should be offered for subscription to raise a working capital of 1000*l.*; that the directors should have power to increase the capital by a sum not exceeding 60,000*l.*; and that the syndicate should have the borrowing powers therein specified.

Neither the plaintiff nor the defendant suggests that no agreement was in fact entered into between them. The dispute is as to its meaning. The defendant contended that as the syndicate, the shares of which he was to obtain in exchange for his farm, was to be a syndicate to "develop Solomon's Temple," such a syndicate meant, by necessary implication, a syndicate equipped with the means reasonably adequate for that purpose, that is, with reasonably sufficient working capital; that the sum provided as working capital was entirely inadequate, and that, therefore, the shares tendered to him were not the kind of shares he bargained for; that he was, accordingly, justified in refusing to accept them or to transfer his farm to the plaintiff in exchange for them.

It was, moreover, contended in argument before their Lordships on the defendant's behalf that it would not be legitimate for the syndicate to provide additional working capital by increasing their capital, or by exercising their borrowing powers, inasmuch as by either of such methods the value of the 3700 shares he was to receive would be depreciated; but that the necessary working capital should be raised out of the 11,800 shares which were divided amongst the vendors and promoters, and that, in effect, the agreement of July 3, 1906, should be construed as if the words "an adequate number of which shall be offered for subscription to provide a reasonably sufficient sum for working capital," or some equivalent words, had been written into the contract immediately after the words "twelve thousand shares" used therein.

The first question for decision on this appeal, therefore, is whether the contract can be read as if these, or equivalent words,

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were by implication imported into it. The principle on which terms are to be implied in a contract is stated by Kay L.J., in *Hamlyn* v. *Wood* (1), in the following words: "The Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied."

In their Lordships' opinion there is nothing in the language of this contract, or the circumstances under which it was entered into, to drive them to the conclusion that the parties to it ever intended to stipulate that a portion of the 12,000 shares, sufficient to raise a reasonably adequate working capital, should be reserved for that purpose.

In the first place, the parties are not at all agreed as to what sum would amount to reasonably sufficient working capital The plaintiff insists that, owing to the geological formation of the farm, lead ore being found in pockets in considerable quantities, prospecting would, to the knowledge of the defendant, be a paying enterprise, and that, therefore, the provision expressly made for raising working capital is ample. The defendant, on the other hand, insists that a sum of from 10,000*l.* to 4000*l.* in cash is absolutely necessary properly to "develop" the property. A great body of evidence was given at the trial on this point on behalf of the defendant, but while most of the witnesses admitted that ore would be won in the process of development, none of them put a value on the ore. It was, however, admitted by Jennings, one of these witnesses, that in development operations on the adjoining farm of Groenfontein (which closely resembled Solomon's Temple in mineral formation), costing from 800*l.* to 900*l.* a month, from eighty to ninety tons per month of rich ore had been won. This would work out at close on 3000*l.* at least. It further appeared that the plaintiff had before August 6, 1906, expended in developing operations on Solomon's Temple about 2000*l.* and won ore of the value of 800*l.*

(1) [1891] 2 Q. B. 488, at p. 494.

In face of this conflict of evidence it is impossible, in their Lordships' opinion, to come to the conclusion that the parties ever arrived at a common understanding as to what sum in cash would be approximately reasonably necessary to "develop" the farm, or ever had a common intention that shares sufficient to realize that sum should be reserved out of the 12,000 of which the capital was to consist and set apart for that purpose.

Again, the amount in cash which a given number of shares would realize must depend on the state of the market. It might be more or much less than 5*l.* a share, so that a provision in the contract that a specified number of the 12,000 shares should be reserved to provide working capital would afford no security that the sum in cash thereby obtainable would be reasonably sufficient for the purpose. Again, a provision that a sufficient, but unspecified, number of these 12,000 shares should be reserved to this end would, unless the reserved shares were at once subscribed for or put upon the market and sold, leave the remuneration of the vendors and promoters unascertained and indefinite, a result which it may, in their Lordships' opinion, be fairly assumed the plaintiff, at all events, never contemplated.

The conclusion at which their Lordships have arrived on this point, however, by no means disposes of this appeal. Two matters not raised in the pleadings, or dealt with at any length in the argument, remain to be considered, namely: (1.) Is the contract as it stands, without any words being by implication imported into it, so ambiguous as to one material matter that specific performance of it cannot, on any principle of equity, or natural justice, be decreed? and (2.) if not, can damages be awarded instead?

The answer to the first of these questions depends on the meaning to be given to the word "develop" as applied to this farm. Does it mean prospecting simply, or prospecting and something more, and, if the latter, how much more, and what operations does the word "prospecting" cover as applied to mineralized land? According to the evidence of the above-mentioned witness Jennings, in prospecting mining would be involved, because out of the hole made for the purpose of prospecting tin ore in the shape of sausages would be won.

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According to the judgment of the Chief Justice the word "development," in its ordinary meaning as applied to mines, "denotes that stage of work on mineralized ground which intervenes between prospecting and mining proper. First the ground is prospected in order to ascertain whether there are minerals in paying quantities. Then it is developed in order to test whether the minerals which have been found are such as to warrant the working of the property as a mining proposition. When that has been established, the property is actually worked and the minerals are extracted."

He then proceeds to shew that the word "develop" cannot, as applied to this farm, be held to have been used in this contract in its ordinary sense, but must be taken to cover the work of examination and exploration such as is described by the witness Mitchell, according to whose evidence the operation consists in exposing and testing shoots, and sinking shafts each 150 feet deep for that purpose.

The other witnesses examined substantially agree with this witness as to the operations necessary to be carried out before mining proper could be commenced, though they differ widely as to the estimated cost.

It is impossible, therefore, on the evidence to determine whether the work of development in the wide sense indicated by the Chief Justice would or would not, in itself, be a paying operation. That, however, is not all, for it is, in their Lordships' opinion, by no means clear that the word "develop" was not used in this contract to cover, to some extent, mining properly so called. It is difficult to suppose that the defendant ever intended to sell the farm for which he had been practically offered over 15,000*l.* in cash for 3700 5*l.* shares in a syndicate which was not under any obligation to mine, in the proper sense—sufficiently, at all events, to ascertain if work of that kind could be carried on at a reasonable profit. The defendant's witness Stevens states in his evidence that "the shoots, as a rule, get poorer as you go down. The object is to find what shoots there are and then work them out. The only practical way of testing is mining. The work would be paid for by the tin found."

The witness Oliffe says: "No development required in

Solomon's Temple. Thorough prospecting would cost 3500*l.* to 4000*l.* Only prospecting and then mining required."

On the evidence it is therefore clear that it is very uncertain what the word "develop" as used in this contract really means, or what are the precise operations it covers. Neither of the parties to the contract has been examined to prove in what sense they understood it. And there can be little doubt that, if the position of the parties were reversed, and the present defendant, having transferred his farm to the plaintiff, were to seek the aid of any tribunal administering equitable principles to compel the latter to carry out his side of the contract, alleging that the operations had been stopped at too early a stage, such as the termination of "prospecting" in its ordinary sense, no relief would be given owing to the ambiguity of the words of the contract, and the consequent impossibility of determining what precisely the present plaintiff should be required to do.

The case is, in truth, a case of the purchase and sale of land, where the price to be paid for the land—the thing to be given in exchange for it—is uncertain, not only in value, but in nature and character, namely, a given number of shares in a syndicate the nature of whose objects, the extent and character of whose operations, and the adequacy of whose working capital are not defined, or ascertainable with precision, so that, if the construction of the contract contended for by the plaintiff be adopted, it may reasonably be supposed to have an effect which the defendant did not contemplate. In such a case the Court will not enforce the agreement, though the defendant may, himself, be responsible for the ambiguity, on the ground that "it is against conscience for a man to take advantage of the plain mistake of another, or, at least, that a Court of Equity will not assist him in doing so": *Manser* v. *Back.* (1) In *Calverley* v. *Williams* (2) Lord Thurlow goes the length of holding that, in such cases, there is no contract, the parties misunderstanding one another, the one proposing to buy one thing, the other to sell another: see *Clowes* v. *Higginson.* (3)

In *Stocker* v. *Wedderburn* (4) it was decided that one party to

(1) (1848) 6 Hare, 443, at p. 448.
(2) (1790) 1 Ves. Jun. 210.
(3) (1813) 1 Ves. & B. 524.
(4) (1857) 3 K. & J. 393.

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a contract cannot obtain specific performance of it against the other party where, from the nature of the things to be done by him under it, specific performance of it would not be decreed against him.

It was not suggested during the argument that the equitable principles thus made applicable to suits for specific performance are not in harmony with the principles of the Roman Dutch law, based as that law is on the Roman law.

Their Lordships are accordingly of opinion that for these reasons specific performance of this contract should not be decreed.

As damages are only claimed in the event of the defendant refusing to assign the farm within the time to be fixed by the Court, of course they cannot be awarded.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed, but that, in the circumstances, the parties ought to bear their own costs in the Supreme Court.

The parties must also bear their own costs of this appeal.

Solicitors for appellant: *R. S. Taylor, Son & Humbert.*
Solicitors for respondent: *Ashurst, Morris, Crisp & Co.*

[PRIVY COUNCIL.]

JOHN McGRATH . . . . . APPELLANT; J. C.*

AND 1908

JUSTICES FOR THE ADELAIDE LICENSING DISTRICT . . . . . RESPONDENTS. *June* 25; *July* 17.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Law of South Australia—Acts 1901, *No.* 773; 1902, *No.* 784—*Act* 1905, *No.* 897, *s.* 5, *sub-s.* 2—*Construction—Brewers' Colonial Ale Licences—Storekeepers' Licences.*

Held, that brewers' colonial ale licences issued under South Australian Act of 1901, No. 773, are not storekeepers' licences within the meaning of s. 5, sub-s. 2, of the Act of 1905, No. 897, which regulates the working of local option. Act 1902, No. 784, ought not to be so applied as to alter the character of licences under the Act of 1901.

APPEAL from an order of the Supreme Court (December 19, 1906) discharging a rule nisi to the respondents prohibiting the determination whether the publican's licence held by the appellant in respect of "Australia's Pride" Hotel should not be renewed.

By a resolution passed under the Acts providing for local option in the Colony it had been determined that the number of publicans' licences in the respondents' district should be reduced, and the respondents then called all the holders of such licences before them with a view to ascertain which of them should be refused renewal. The appellant, among others, appeared and took objections in limine to the jurisdiction. The respondents overruled his objections and the rule nisi mentioned above was issued. At the hearing the appellant contended that the poll was invalid, not having been taken in conformity with the Local Option Act, 1905. He contended that prior to and at the time of the taking of the said poll two "brewers' colonial ale licences" which were not included in the Minister's certificate fixing the integers for the said poll pursuant to the Local Option Act, 1905

* *Present:* LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

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(5 Edw. 7, No. 897), were current in the local option district of Port Adelaide. These two licences were, it was contended, in law "storekeepers' licences," and the number of "storekeepers' licences" in the said district should accordingly have been stated in the said certificate to be three, and not one only.

The Court discharged the rule, holding that brewers' colonial ale licences were not in law storekeepers' licences, and that there had been no irregularity in the resolutions submitted at the poll.

Balfour Browne, *K.C.*, *Avory*, *K.C.*, and *Bodkin*, for the appellant, contended that on the true construction of the Acts above mentioned the two licences in question were storekeepers' licences within the meaning of the Act of 1905, and that their omission from the Minister's certificate fixing the required integers was an irregularity which vitiated the poll. Reference was made to *King* v. *Woodhouse*. (1)

Danckwerts, *K.C.*, and *Rowlatt*, for the respondents, contended that the two licences were not storekeepers' licences and that there was no irregularity.

1908 *July* 17.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal from an order of the Supreme Court of South Australia, dated December 19, 1906, which discharged an order to shew cause why a writ of prohibition should not issue restraining the justices for the Adelaide licensing district from proceeding to determine whether the publican's licence held by the appellant should or should not be renewed.

The controversy arises out of the local option legislation of the Colony. The Act at present in force, regulating the working of local option, is that of 1905, No. 897.

The general object of the Act appears to be to enable the voters in a local option district, under certain conditions and with certain limitations, to limit, if they so think fit, the number of licences of the classes specified to be issued or renewed within their district for the sale of alcoholic liquors.

The process provided is that proceedings are to be initiated by

(1) [1906] 2 K. B. 501; S. C. 75 L. J. 745.

a petition. On receipt of the petition, and after its due verification, the Governor in Council is to direct the returning officer of the electoral district comprising the local option district concerned to cause a poll of the electors to be taken.

Sect. 5, sub-s. 2, is as follows: "The Minister shall upon the presentation of any such petition fix a number (which shall be two-thirds or the nearest integer not less than two-thirds), which number is hereinafter called the integer of two-thirds, and a number (which shall be five-sixths or the nearest integer not less than five-sixths), which number is hereinafter called the integer of five-sixths, of each one of the following classes of licences which shall at the time of the receipt of the petition be current in respect of premises situate within such local option district, that is to say, (1.) publicans' licences; (2.) wine licences; (3.) storekeepers' colonial wine licences; (4.) storekeepers' licences; (5.) club licences. The decision of the Minister in fixing the integer of two-thirds and the integer of five-sixths shall be final; and a certificate under the hand of the Minister that he has fixed such integer shall be conclusive evidence in all Courts that such integer was properly fixed and that such number was the correct number."

Sub-s. 3: "At every poll the following resolutions shall be submitted to electors in respect of each of the above-mentioned classes of licences, subject, however, to sub-s. 6 of this section:—

"1. That the number of licences be reduced from the present number to the integer of two-thirds;

"2. That the number of licences be reduced from the present number to the integer of five-sixths;

"3. That the number of licences be not increased or reduced;

"4. That the number of licences be increased in the discretion of the licensing bench;

"The above resolutions are hereinafter referred to as the first, second, third, and fourth resolutions respectively."

Sub-s. 4 directs that a separate ballot paper in the prescribed form shall be issued to each elector in respect of each of the above-mentioned classes of licences.

The form of the Minister's certificate, as prescribed by regulations, states in one column the existing number of licences in

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each of the enumerated classes, and in two other columns the two integers for each class which the Act requires him to fix.

A poll was taken in the Port Adelaide local option district, and similar polls in other districts, and the licensing justices were proceeding to act, as the law required them to act, upon the result of those polls, when objections were raised in many instances to the validity of what had been done. Applications were made to the Supreme Court for writs of prohibition to restrain the proceedings of the licensing bench.

The learned judges of the Supreme Court, in one set of judgments, disposed of a number of such applications, in some of which they made absolute the rule for a prohibition, while in the case of the present appellant they discharged the rule.

In the judgments out of which this appeal arises the learned judges held, after a careful examination of the Acts bearing upon the matter, that, although the Act provides for separate voting in respect of the several classes of licences, an illegality with respect to one class invalidated the whole poll with respect to all classes of licences.

The specific illegality alleged to have occurred in the present case was this. The appellant was the holder of a publican's licence. It was not said that there was any irregularity in the official documents relating to publicans' licences. The same thing is true with regard to wine licences and storekeepers' colonial wine licences and club licences, but it was said that under the fourth heading, "storekeepers' licences," two licences were omitted from the number which ought to have been included therein. Those two licences were "brewers' colonial ale licences" issued under the Act of 1901, No. 773. The learned judges held that such licences were not storekeepers' licences within the meaning of the Act of 1905, and that therefore their omission from the number of such licences did not invalidate the poll. The correctness of that decision was the principal subject of discussion on the argument of the appeal before their Lordships.

The actual question is whether a brewer's colonial ale licence is a storekeeper's licence within the meaning of the Act of 1905, s. 5, sub-s. 2. But to solve that question it is necessary to go further

back. Of the kinds of licences mentioned in the sub-section, the first, publicans' licences, are governed by the Licensed Victuallers Act, 1880, No. 191. Such a licence authorizes the person licensed to sell liquor in any quantity on the premises therein specified. The second class mentioned in the sub-section authorizes the licensee to sell wine and certain other liquors, as defined in the Act, for consumption on and off the premises. The third class, storekeepers' colonial wine licences, authorizes the sale of wine and other liquors, as defined, in quantities not below a reputed quart, not to be consumed on the premises. The fifth class, club licences, need not be further noticed. The question arises with regard to No. 4, storekeepers' licences. They are governed by s. 10 of the Act of 1880. Such a licence authorizes the person licensed (to state it shortly) to sell liquor, not to be consumed on the premises, in quantities not less than a gallon.

So far the licences to be considered are provided for by the Act of 1880.

In 1901 another Act was passed, No. 773. It was incorporated with the Act of 1880 and with all other Acts incorporated therewith. It said in s. 2 that "In addition to licences provided to be granted, there shall be one, to be denominated 'brewer's colonial ale licence,' which shall be granted only to brewers . . . . and shall be in the form of the Schedule X. to this Act."

Sect. 4 prescribes that the brewer thus licensed may sell in quantities not less than two gallons.

Sect. 5 enacts that "No person while holding a brewer's colonial ale licence shall be capable of holding a storekeeper's licence or a wine licence."

By s. 6, "All the provisions of the Acts read and incorporated herewith, referring to or dealing with storekeepers' licences, shall, except where inconsistent herewith or inapplicable hereto, apply to a brewer's colonial ale licence in the same manner as if a provision had been made in such sections for such licences in addition to storekeepers' licences."

If these had been the only Acts to be considered, it would have been difficult to say that a brewer's colonial ale licence could be called a storekeeper's licence.

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The two licences are authorized by different Acts, they are obtainable by different people, the sales licensed by the two are different, and the Act of 1901 treats them as separate and distinct things. But much stress was laid in argument upon another Act passed in 1902, No. 784, which enacted (s. 3) that a storekeeper's licence, if issued to a distiller, should authorize the sale of liquor not less than two gallons not to be drunk on the premises, these conditions being the same as those of the brewer's colonial ale licence.

Sect. 5 enacts that no distiller while holding such a licence shall hold a storekeeper's licence or a wine licence. Sect. 6 enacts that all the provisions of the incorporated Acts applicable to a storekeeper's licence shall apply to a licence under the Act.

The language of this Act is very different from that of the Act of 1901, for it clearly treats the licences with which it deals as storekeepers' licences, and its enactment ought not, in their Lordships' opinion, to be so applied as to alter the character of licences under the Act of 1901.

It was argued that it should be assumed that the intention of the Legislature, when passing the Act of 1905, was to bring all classes of licences within the scope of local option, but that is a somewhat dangerous mode of argument. The real question is whether the Legislature in the language which it has used has expressed the intention of bringing the class of licences in question within the operation of local option.

Their Lordships are of opinion that the learned judges of the Supreme Court were right in holding that brewers' colonial ale licences are not storekeepers' licences within the meaning of s. 5, sub-s. 2, of the Act of 1905.

The view which their Lordships take upon the foregoing question makes it unnecessary to consider any of the other questions raised upon the argument of the appeal. Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs.

Solicitors for appellant: *Gribble, Oddie, Sinclair & Johnson.*
Solicitors for respondents: *Freshfields.*

[PRIVY COUNCIL.]

CORPORATION OF THE CITY OF TORONTO . . . . . } DEFENDANTS; J. C.* 1908 July 3, 7, 30.

AND

JOHN RUSSELL . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Law of Ontario—Sale of Lands under Assessment Act, 1897—*Notice in Writing under s.* 184, *sub-s.* 3—*Construction—Waiver—Effect of* 3 *Edw.* 7, *c.* 86, *s.* 8.

The plot of land in suit in the city of Toronto belonging to the respondent was advertised to be sold on April 10, 1901, under Ontario Assessment Act, 1897, for arrears of taxes, and after an adjournment was bought by the appellants on April 24. The appellants in the interval had advertised their intention to purchase in case the amount bid was less than the arrears due, but omitted to give the respondent a notice in writing under s. 184, sub-s. 3, to that effect.

In an action by the respondent in September, 1906, to set aside the sale on the grounds (1.) that the land was insufficiently described in the assessment roll; (2.) that he did not receive the said notice:—

Held, (1.) that s. 8 of 3 Edw. 7, c. 86, cured the defect (if any) in the assessment roll; (2.) that the Act intended that the notice under s. 184, sub-s. 3, should be given to the owner, but that the respondent could and did waive it; otherwise that the failure to give it was within the words of the said s. 8 and was cured by it.

Held, further, with regard to the respondent's alternative claim to redeem, that the period of one year from the date of sale allowed by the Assessment Acts of 1892 and 1897 had not been altered by subsequent legislation in any manner applicable to this case.

APPEAL from a decree of the Court of Appeal (December 23, 1907), affirming by a majority a decree of Macmahon J. (February 14, 1907) directing the appellants to deliver up the lands in question to the respondent upon payment of the amount of taxes to be found due and owing against the lands upon a reference.

The trial judge found under the circumstances which are detailed in the judgment of their Lordships, and the Court of

* *Present:* LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, SIR ARTHUR WILSON, and SIR HENRI ELZÉAR TASCHEREAU.

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Appeal sustained the findings: (1.) that the assessment was invalid and the sale void owing to an insufficient description of the lands assessed; (2.) that no "written notice" was given to the respondent of the appellants' intention to buy in lots at the sale, and that the Act required notice to be so given; (3.) that the validating Acts did not apply to these defects.

Shepley, K.C., and *W. N. Tilley*, for the appellants, contended that on the evidence the description was sufficient and that sufficient notice had been given, otherwise that the defect was cured by the validating Acts, 3 Edw. 7, c. 86, s. 8, amended by 6 Edw. 7, c. 99, ss. 8, 9: see also ss. 208 and 209 of the Assessment Act, 1897.

R. S. Cassels, for the respondent, contended that the description was lacking in the certainty essential in proceedings leading to the forfeiture of rights of property; that the only notice given of the appellants' intention to buy was by advertisement, and was vague and uncertain in its terms. With regard to validation, ss. 208 and 209 did not apply, and the Acts of Edward VII. did not relate specifically to the defects alleged in this case. Then there was both a general and a statutory right of redemption, and the period had not expired because the certificate of sale, from the giving of which the period runs, was invalid and void, the description of the land and the amount required to redeem it not being set out in it.

Shepley, K.C., replied.

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The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment of the Court of Appeal for Ontario, dated December 23, 1907, upholding the judgment of the trial judge, whereby it was held that a sale of certain lands of the plaintiff (respondent) to the defendants (appellants) in respect of taxes due to the defendants thereout was invalid, and that a certain deed, dated October 1, 1902, by which the said lands were conveyed to the defendants, should be delivered up to be cancelled, and further that the plaintiff was entitled to redeem the said lands on paying to the defendants all the taxes due thereout, including those

which had accrued since the said sale, together with the interest thereon.

It will be observed that this latter relief necessarily presupposes that taxes had accrued on these lands before the sale, which must mean either that the lands were validly and properly assessed for those taxes, or, if invalidly assessed, that the invalidity had in some way been effectively cured. But one of the main arguments before their Lordships was that the assessment roll had, by reason of the insufficient description of the property contained in it, been improperly drawn up; that the assessment of the property was therefore invalid; that this invalidity was not cured; and that no taxes had ever accrued upon the lands at all. If, therefore, the sale has been declared invalid by reason of the illegal and improper assessment of the land, the two forms of relief given are entirely inconsistent with each other.

The facts of the case are simple and instructive.

The plaintiff, a citizen of the city of Toronto and an alderman of its corporation, in the year 1892, during a boom in the real estate market, purchased as a speculation a plot of land about eight acres in extent in ward No. 1, division 2, near the intersection of two thoroughfares of the city named Carlaw Avenue and Queen Street respectively, the first running north and south and the second east and west. The plot was valued in that year at close upon $26,000, and was liable to be assessed for a special rate or tax in respect of certain sanitary works by which it was alleged to have benefited, in addition to the taxes leviable by the city for general purposes.

The boom soon ceased. The value of real property rapidly declined. The valuation of this plot sank from $25,710 in 1892 to $8570 in 1895 and to $3000 in 1897. In the face of this decline the plaintiff did not dispute that these lands of his were validly assessed, and that rates or taxes were due upon them, but he determined to diminish his loss, at least for the time being, by refusing or omitting (with the exception hereafter mentioned) to pay any of the taxes due in respect of them to the corporation, of which he was a member, so that in April, 1901 (the date of the impeached sale), there remained still due for

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taxes leviable on this plot the sum of $8857.48, and in January, 1907, the sum of $13,387.48.

The result of the plaintiff's neglect to discharge the liabilities attaching to the property, the benefit of which he was enjoying, and for which he swears he was all these years receiving rent, was that the burden he ought to have borne was thrown on the shoulders of his fellow-citizens.

In order to recover the arrears due the Mayor of Toronto, purporting to act in exercise of the powers conferred upon him by two statutes, styled "the Consolidated Assessment Act, 1892," and "the Assessment Act" (Rev. Stat. Ont. 1897, c. 224), and the Acts amending the same, on December 20, 1900, issued his warrant, directed to the city treasurer, the proper officer, commanding him to sell the several plots of land, over 1000 in number, described in the several ward lists thereunto annexed, for the arrears of taxes then due upon them and costs.

The plaintiff's plot was amongst those so directed to be sold, and was described in the ward list as follows:—

WARD 1. DIVISION 2.

Parcel No.	Description of property to be sold for arrears of taxes.	Name of person assessed as owner or otherwise.	Years in arrears.	Amount of taxes in arrears.	Charges for commission.	Charges for advertising.	Total.
				$	$	c.	$
118	8 57/100 acres (1242 × 300 east side Carlaw Ave., north of Queen St.).	John Russell	1892 to 1898	8640.62	216.01	85	8857.48

Advertisements were duly published in the *Ontario Gazette* announcing the sale to be held on April 10, 1901, of the lands described in these lists, and notices of the intended sale were, in the form prescribed by the above-mentioned statutes, duly published in the local papers. It is contended that the above description of the lands, which was copied from the assessment roll, is insufficient, but it is admitted by the plaintiff himself that, with this exception, everything that was done up to and including the issue of the mayor's warrant was regular and

proper; and in argument before their Lordships it was not suggested that, save in this matter of the description of the lands on the assessment roll and in the lists and advertisements up to April 9, 1901, the requirements of the above-mentioned statutes had not been observed.

Sales of several lots of these lands for arrears of taxes due thereon had been attempted in January and April, 1898, but without success. A body called "the Board of Control" (which is apparently of the nature of a committee of the corporation having the matter of these sales in hand), mindful of what had occurred in 1898, had before the day fixed for the sale (April 10) reported to the corporation on the subject; and that report having come up for consideration at the meeting of the corporation on April 9, 1901, the following paragraph of the report was adopted: "The board have received a communication from the city treasurer stating that the Assessment Act empowers municipalities to purchase lands offered for arrears of taxes when the price offered at the adjourned sale is less than the amount of arrears registered against such lands, provided the council of the municipality has signified its intention to do so at least one day before the sale, and, on the advice of the treasurer, recommend that such notice be given before the date of the adjourned sale on the 24th inst., and that an officer of the corporation, viz., the assessment commissioner, be authorized and instructed to purchase and acquire such lands for and on behalf of the corporation as may be deemed advisable in the city's interest, the said lands so acquired to be again offered for sale within the time specified in the statutes, namely, seven years."

From the minutes of the corporation it appears that the plaintiff was one of the members present at this meeting who adopted this paragraph of the report. When examined for discovery on oath, he did not venture to deny it.

The sale on April 10 proved, as was anticipated by the members present at the meeting of the previous day, abortive, and was adjourned, as it was evidently arranged it should be, to the 24th of the same month.

No notice in writing was served upon the plaintiff of the intention of the corporation to purchase the lands so advertised for

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sale if the price offered at the adjourned sale should be less than the arrears; but a notice to the following effect was published in the *Ontario Gazette* and in several local papers:—

"ADJOURNED SALE OF LANDS FOR TAXES.

"Will take place on Wednesday, April 24th, 1901, at 10.30 o'clock A.M.

"Pursuant to instructions from the city council, the corporation of the city of Toronto, under the provisions of section 184 of the Assessment Act, hereby gives notice of its intention to purchase such of the lands offered at the said adjourned sale as may be deemed advisable and in the interest of the city, if the sums offered for the said lands are less than the arrears due.

"R. T. Coady,
"City Treasurer.

"City Treasurer's Office,
"Toronto, April 11th, 1901."

The adjourned sale came on on April 24, and the assessment commissioner attended it. Believing that it was necessary that a bid should be made by some third party to fulfil the technical requirements of s. 184, sub-s. 3, of the Assessment Act of 1892, he procured two persons to make two bids, and ultimately bought the plaintiff's lands for the amount due upon them for arrears. The lands were subsequently by the deed of October 1, 1902, by a full and adequate description, conveyed to the defendants.

The plaintiff has formally admitted that before each of the sales he knew his lands were to be offered for sale for taxes; that before April 10, 1901, he knew that his lands were then to be offered for sale, and also that no sale had been effected on that day; and that his lands were to be again offered for sale on April 24, but that he made no inquiries as to what happened on the latter occasion. He paid the general purposes taxes for the years 1892, 1893, and 1894, but none others. He admits that he never took any steps to redeem the land till 1905; that he had always been in possession of the land, which was "closed in" and had always been rented (though it did not appear to have been built upon or used for any purpose); and that he always knew that the land so closed in was the land which was

under consideration and in question. He now seeks to have this sale set aside, on the grounds (1.) that his land was insufficiently described in the assessment; (2.) that he did not receive written notice of the corporation's intention to buy on April 24; and (3.) that the assessment commissioner had been given a discretion to buy or not to buy at the sale on April 24. Yet he himself must have known how his land was described, and he never objected to the description; he was fully cognizant of the corporation's intention to buy; and he had himself joined in conferring on the commissioner the discretion of which he now complains. Unless, therefore, it be a merit in a citizen of a municipality not to pay his debts to the corporation of which he is a member, this is on the part of the plaintiff the most unmeritorious proceeding that could well be conceived.

The main objections to the description of the plot on the assessment roll put forward by the plaintiff were (1.) that the land was stated to be vacant; and (2.) that by not stating where the frontage began or ended it was impossible to identify its position. There is much to shew that the description was adequate. Its alleged insufficiency was not shewn to have misled anybody, least of all the plaintiff. If, however, it was insufficient or erroneous, it was only so because the roll was not made up in accordance with the requirements of the Assessment Act of 1892. But by s. 8 of 3 Edw. 7, c. 86, a remedial Act passed to cure defects in sales of this kind which had taken place in the city, it was provided as follows: "All sales of land within the said city up to and including the one held in the year 1902, and purporting to be made for arrears of taxes in respect of the lands so sold are hereby validated and confirmed, notwithstanding any irregularity in the assessment or other proceedings for imposition of any taxes so in arrear, or any failure to comply with the requirements of the Consolidated Assessment Act, 1892, or the Assessment Act in regard to the manner in which any assessment roll, or collector's roll of the said city has been prepared."

The concluding proviso shews clearly that the section applies to sales to the corporation for arrears of taxes, and it is obvious that the insertion of an insufficient or inaccurate description of

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premises in the assessment roll is a failure to comply with the requirements of these two statutes, since they require a description to be inserted which is neither inaccurate nor insufficient. Their Lordships are therefore clearly of opinion that this defect, if it exists, comes within the very words of this statute and is cured by it.

The next point relied upon by the plaintiff is that he did not, as required by s. 184, sub-s. 3, of the Assessment Act, receive from the council notice in writing of their intention to purchase his lands at the adjourned sale should less than the amount of the arrears be bid for them. Their Lordships concur with both the Canadian Courts in thinking that the notice must, if given, be given to the owner of the lands, though it is not so expressed in the statute. But the notice, by warning the owner of what is about to take place, can only serve the purpose of enabling him either (1.) to oppose the sale as illegal or improper; or (2.) to attend the sale and bid at it, and see that it is regularly conducted; or (3.) to redeem his land by payment of the taxes due. These being things entirely for his own benefit, he can undoubtedly waive the notice: *Great Eastern Ry. Co.* v. *Goldsmid.* (1) The question is, Has he waived it? In other words, is there evidence from which it may fairly be inferred that he consented to dispense with the notice? Bowen L.J. in *Selwyn* v. *Garfit* (2) says: "What is waiver? Delay is not waiver. Inaction is not waiver, though it may be evidence of waiver. Waiver is consent to dispense with the notice. If it could be shewn that the mortgagor had power to waive the notice, and that he knew that the notice had not been served, but said nothing before the sale and nothing after it, although this would not be conclusive, there would be a case which required to be answered."

The plaintiff must be fixed with the knowledge of what passed at the meeting of April 9 at all events. Nowhere does he state that he did not know, or did not think, that the service of notice upon him was not necessary to validate the sale. And it is clear from his evidence that he knew the defendants had purchased

(1) (1884) 9 App. Cas. 927, at p. 936. (2) (1888) 38 Ch. D. 273, at p. 284.

his lands, for, as an explanation of his not having made any move to redeem them till the year 1905, he states on oath: "I thought that when the city held the land it was all right; I could redeem it any time I liked. . . . . I always had it in my mind that, as long as the city had my property, I could, by paying the taxes, redeem it."

There is no evidence to shew that the plaintiff, up to a short time before bringing this action, ever complained that he had not received the notice which his counsel now insist was a condition precedent to a valid sale, or that the sale was invalid for any reason. On the contrary, he treated the sale as valid, but mistook the effect of it on his right to redeem. Their Lordships think that, in the absence of all explanation by the plaintiff other than that given in his evidence on discovery, the legitimate inference to be drawn is that he consented to dispense with this notice—that is, he waived it.

Their Lordships are moreover of opinion that, since the main and obvious purpose and object of the Legislature in passing the Act 3 Edw. 7, c. 86, was to validate sales made for arrears of taxes in the carrying out of which the requirements of the different statutes as to the mode in which they should be conducted had not been observed, and to quiet the titles of those who had purchased at such sales, the statute should, where its words permit, be construed so as to effect that purpose and attain that object.

The council can only act through its officers. The notice to be given by the council must be given by or through one of its officers. The omission to give it may therefore be fairly held to be "a failure or omission on the part of an official of the said city" to comply with the requirements of the Consolidated Assessment Act, 1892, and the Assessment Act, within the words of this statute.

The plaintiff's third point was that, in the certificate given by the treasurer under s. 193 of the Assessment Act, the description of the property sold was in itself insufficient and differed from the description of the parcel in the deed. Even assuming that this section applies to a purchase by the council like the present one, the same remark applies to it as to the preceding

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point. The defect is cured by the same words of the same statute.

The fourth point is as to the alleged impropriety of the assessment commissioner getting two men to make bids at the adjourned sale of less than the amount of the taxes due. It is an abuse of language to describe this as a fraud. It was a perfectly harmless and unnecessary proceeding. The commissioner, thinking erroneously that a bid was technically necessary to satisfy the conditions of the statute, procured these men to make the bids, but they were in no sense "puffers." Under s. 148 of 4 Edw. 7, c. 23, the municipality were to purchase for the amount due and no less. These bids did not raise the price or induce any one to offer more than he would otherwise have offered. Their Lordships think the incident in no way invalidates the sale.

The only remaining question is that touching the plaintiff's right to redeem. The plaintiff swore that he thought he could redeem at any time. His counsel contended that he was entitled to do so at any time. If so, the litigation to set aside the sale was a useless proceeding. This contention is sought to be supported by confining attention to s. 148 of 4 Edw. 7, c. 23, and ignoring the provisions of the general statute by which the redemption scheme is shaped.

By s. 200 of the Assessment Act and s. 180 of the Consolidated Assessment Act, 1892, in the case of an ordinary purchaser of land sold for arrears, the owner may, within a year from the day of sale, redeem the land sold by tendering for the benefit of the purchaser the purchase-money plus 10 per cent. Under s. 184, sub-s. 2, of the Assessment Act, when the treasurer sells land for less than the amount due for taxes at an adjourned sale, the owner can only redeem by paying the full amount due for taxes plus the expenses of sale and 10 per cent. Where the land is under sub-s. 3 bought by the municipality for the entire amount due for taxes, the owner can only redeem by paying the full amount due plus the expenses of sale, but not the 10 per cent.; but the period during which redemption may take place remains the same, namely, one year from the day of sale.

Sect. 11 of 3 Edw. 7, c. 21, amends sub-s. 3 of s. 184 by

providing that the owner, where he desires to redeem land purchased by the municipality, must pay not only the entire amount of the taxes which have accrued upon the property, but also the taxes which would have accrued upon it if it had remained the property of the former owner and been liable for ordinary taxation. But no change whatever is made as to the redemption period. It is still a year from the day of sale.

By the Act 3 Edw. 7, c. 86, however (an Act respecting the city of Toronto), the period of redemption was altered to this extent, that it provided that any land so sold for taxes which was at the passing of the Act still held by the corporation might be redeemed by the owner or any mortgagee thereof within three months from the passing of that Act (that is, within three months from June 12, 1903), on the terms of the owner or mortgagee paying to the corporation all that would have been necessary to redeem the same within one year from the day of sale, together with all taxes since accrued, for the year or years in which it was not rated, and with a further sum equal to what would have accrued thereon for taxes at the current rate with interest.

The general Act (4 Edw. 7, c. 23) was passed the following year. By the before-mentioned section it regulates the amount to be paid to redeem where a municipality purchases land for the taxes due on it, but does not in any way alter the periods for redemption, either expressly or by implication, and the construction put upon it by the plaintiff's counsel would make it entirely inconsistent with the Assessment Amendment Act, 1898, which, in conjunction with the above-mentioned s. 184, requires that the municipality should sell the lands within seven years from the time they acquire them.

As the writ in this action bears date September 21, 1906, the extended period for redemption had expired before the action commenced.

In the opinion of their Lordships, therefore, the decisions both of the trial judge and of the Court of Appeal of Ontario were erroneous and should be reversed. Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed, that the judgments of the Court of Appeal and of the

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High Court should be set aside, and the action dismissed with costs in both Courts.

The respondent must pay the costs of the appeal.

Solicitors for appellants: *Freshfields.*

Solicitors for respondent: *Poole & Robinson.*

[PRIVY COUNCIL.]

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CROWN GRAIN COMPANY, LIMITED . . DEFENDANTS;

AND

H. L. DAY . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Powers of Provincial Legislature—Appellate Jurisdiction of Supreme Court of Canada—Manitoban Act (R. S. M. c. 110, s. 36) limiting Right of Appeal ultra vires—British North America Act, 1867, s. 101.

By s. 101 of the British North America Act, 1867, the Parliament of Canada was authorized to establish the Supreme Court of Canada, the existing statute being R. S. C. 1906, c. 139, ss. 35 and 36 of which define its appellate jurisdiction in respect of any final judgment of the highest Court of final resort now or hereafter established in any province of Canada.

The Manitoban Mechanics' and Wage Earners' Lien Act (R. S. M. c. 110, s. 36) applies to the suit under appeal and enacts that in suits relating to liens the judgment of the Manitoban Court of King's Bench shall be final and that no appeal shall lie therefrom :—

Held, that the provincial Act could not circumscribe the appellate jurisdiction granted by the Dominion Act.

APPEAL by special leave from an order of the Supreme Court (May 22, 1907) which dismissed the appellants' motion to quash an appeal from the Manitoban Court of King's Bench in banc (January 18, 1906).

The question decided was whether the Legislature of Manitoba had power to enact by c. 110, s. 36, of its revised statutes as follows:—Sect. 36. " In all actions where the total amount of the claims of the plaintiff and other persons claiming liens is more than

* *Present:* LORD LOREBURN L.C., LORD ROBERTSON, LORD ATKINSON, SIR ARTHUR WILSON, and SIR HENRI ELZÉAR TASCHEREAU.

one hundred dollars, any party affected thereby may appeal therefrom to the Court of King's Bench in banc, whose judgment shall be final and binding, and no appeal shall lie therefrom. The procedure upon appeal from the judgment of a local judge shall be the same as upon appeal from a judgment of a judge. 61 Vict. c. 29, s. 36."

The action was brought alleging that the respondent had in respect of materials furnished and work done become entitled to a lien under the Act upon certain lands and buildings thereon, the property of the appellants; that subsequently the respondent, pursuant to the said Act, caused to be filed and registered in the Winnipeg Lands Titles Office a statement of his claim or lien in the form provided and duly verified as required by the Act, and the respondent claimed payment of the sum of $2020.00, the balance alleged to be due, together with interest.

Macmaster, K.C., and *Hickson, K.C.*, for the appellants, contended that the rights acquired under the Manitoban Act were the creation of the statute and are subject to its limitations and restrictions. The particular right of lien in question is a civil right arising out of contract and is intra vires of the provincial Legislature. The Act was assented to by the Crown and only limits the right of appeal as incident to a particular contract. It in no way conflicts with the general appellate jurisdiction of the Supreme Court as established by the Dominion under s. 101 of the British North America Act, 1867. They referred to *Théberge* v. *Landry* (1); *Citizens' Insurance Co.* v. *Parsons* (2); *Dobie* v. *Temporalities Board* (3); *Hodge* v. *Reg.* (4); *Attorney-General for Ontario* v. *Attorney-General for Dominion* (5); *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (6); *Grand Trunk Ry. Co. of Canada* v. *Attorney-General of Canada* (7); *Danjou* v. *Marquis* (8); *Clarkson* v. *Ryan* (9); *City of Halifax* v. *McLaughlin Carriage Co.* (10)

(1) (1876) 2 App. Cas. 102.
(2) (1881) 7 App. Cas. 96.
(3) (1881) 7 App. Cas. 136.
(4) (1883) 9 App. Cas. 117.
(5) [1896] A. C. 348.
(6) [1902] A. C. 73.
(7) [1907] A. C. 65.
(8) (1879) 3 Can. Sup. Ct. Rep. 251.
(9) (1890) 17 Can. Sup. Ct. Rep. 251.
(10) (1907) 39 Can. Sup. Ct. Rep. 174.

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Th. Chase-Casgrain, K.C., for the Attorney-General of Manitoba, intervenant, contended that the power given by s. 101 of the British North America Act, 1867, to the Dominion to create a general Court of Appeal for Canada in no way abridged the rights of litigants to appeal to the King in Council directly from the decision of a Court of last resort in a province. Similarly it did not deprive the province of the right to create provincial Courts with limited rights of appeal therefrom. It contemplated the creation of a general Court of Appeal to which litigants might resort in cases where the appeal had not been competently regulated by the provinces in matters in regard to which those provinces had exclusive jurisdiction.

Ewart, K.C., and *R. O. B. Lane, jun.*, for the respondent, and *Newcombe, K.C.*, for the Attorney-General for the Dominion, intervenant, were not heard.

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The reasons for their Lordships' report were delivered by

LORD ROBERTSON. By the 101st section of the British North America Act, 1867, the Parliament of Canada was authorized to provide for "the constitution, maintenance, and organization of a general Court of Appeal for Canada"; and by Act of the Dominion Parliament the Supreme Court of Canada was accordingly established, the existing statute being Rev. Stat. Canada, 1906, c. 139. It is inconceivable that a Court of Appeal could be established without its jurisdiction being at the same time defined; and this statute contains these provisions:—

"The Supreme Court shall have, hold, and exercise an appellate civil and criminal jurisdiction within and throughout Canada" (s. 35).

"Except as hereinafter otherwise provided an appeal shall lie to the Supreme Court from any final judgment of the highest Court of final resort now or hereafter established in any province of Canada" (s. 36).

If this Dominion statute be the governing enactment in hac re, it unquestionably allows the appeal to the Supreme Court of Canada, the competency of which was challenged in this case.

The question now in dispute is whether that enactment has been affected, and so far defeated, by an Act of the Legislature

of Manitoba which admittedly purports to apply to the suit in which the appeal was brought, and which makes the judgment of the provincial Court final and conclusive. The Manitoba statute relates to liens; and it is in regard to suits about liens that appeal is excluded. Liens are admittedly in the region of legislation appropriated to provincial Legislatures by the British North America Act. It is incidentally to the subject of liens that the Manitoban legislation provides that the judgment of the Court of King's Bench on suits relating to liens shall be final and binding, and that no appeal shall lie therefrom. This enactment is in direct conflict with the general provisions of appeal in the Dominion Act; and the question is, which enactment prevails?

The appellants maintain that the implied condition of the power of the Dominion Parliament to set up a Court of Appeal was that the Court so set up should be liable to have its jurisdiction circumscribed by provincial legislation dealing with those subject-matters of litigation which, like that of contracts, are committed to the provincial Legislatures. The argument necessarily goes so far as to justify the wholesale exclusion of appeals in suits relating to matters within the region of provincial legislation. As this region covers the larger part of the common subjects of litigation, the result would be the virtual defeat of the main purposes of the Court of Appeal.

It is to be observed that the subject in conflict belongs primarily to the subject-matter committed to the Dominion Parliament, namely, the establishment of the Court of Appeal for Canada. But, further, let it be assumed that the subject-matter is open to both legislative bodies; if the powers thus overlap, the enactment of the Dominion Parliament must prevail. This has already been laid down in *Dobie* v. *Temporalities Board* (1) and *Grand Trunk Ry. Co. of Canada* v. *Attorney-General of Canada.* (2)

For these reasons their Lordships on the July 9 last agreed humbly to advise His Majesty that the appeal ought to be dismissed, and directed the appellants to pay the respondent's costs of the appeal, and the Attorney-General for the Dominion

(1) 7 App. Cas. 136. (2) [1907] A. C. 65.

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of Canada and the Attorney-General of Manitoba to bear their own costs respectively.

Solicitors for appellants and the Attorney-General for Manitoba: *Lawrence Jones & Co.*

Solicitors for respondent: *Harrison & Powell.*

Solicitors for Attorney-General for Canada: *Charles Russell & Co.*

[PRIVY COUNCIL.]

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ALFRED S. WOODRUFF AND OTHERS . . DEFENDANTS;

AND

ATTORNEY-GENERAL FOR ONTARIO . . PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Powers of Provincial Legislature—British North America Act, 1867, *s.* 92, *sub-s.* 2—*Ontario Succession Duty Act* (*R. S. O.*, 1897, *c.* 24)—*Provincial Taxation of Property not within the Province ultra vires.*

It is ultra vires the Legislature of Ontario to tax property not within the province: see British North America Act, 1867, s. 92, sub-s. 2:—

Held, accordingly, that the Succession Duty Act (R. S. O., 1897, c. 24) does not include within its scope movable properties locally situated outside the province of Ontario which it was alleged that the testator, a domiciled inhabitant of the province, had transferred in his lifetime with intent that the transfers should only take effect after his death.

Blackwood v. *Reg.*, (1883) 8 App. Cas. 82, followed.

APPEAL and cross-appeal from a judgment of the Court of Appeal (December 31, 1907) modifying a judgment of Falconbridge C.J. (January 5, 1907) dismissing the respondent's action.

The Court of Appeal held, under the circumstances which are detailed in their Lordships' judgment, that the executors of Samuel De V. Woodruff's will wrongfully omitted from their affidavit of value and relationship the property comprised in the transfers or settlements of 1902. Meredith J.A. held that

* *Present:* LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

the property comprised in the trust deeds of 1894 was also wrongfully omitted.

The appellants claimed that this judgment should be reversed and that the dismissal of the action on January 5, 1907, should be restored. The respondent claimed in cross-appeal that the Court of Appeal should have included the property comprised in the deed of 1894 within its decree.

The respondent sued to recover succession duty payable to the province of Ontario by virtue of the Succession Duty Act, being R. S. O., 1897, c. 24, as amended by 62 Vict. (2.) c. 9 (Ont.), 1 Edw. 7, c. 8, s. 6 (Ont.), and 2 Edw. 7, c. 12, s. 6 (Ont.).

The question decided by their Lordships was whether the Succession Duty Act as amended was intra vires of the provincial Legislature.

Danckwerts, K.C., and *H. H. Collier*, K.C., for the appellants, after contending that the foreign municipal bonds and debentures in suit were not, in the circumstances of the case, dutiable under the Succession Duty Act according to its true construction, submitted that that Act, so far as it related to property outside the province, was ultra vires the provincial Legislature. They referred to ss. 91 and 92 of the British North America Act, 1867. The tax claimed in this case must be regarded as in the nature of an estate or probate duty imposed directly on property rather than on the persons taking. Though the property was movable it had a foreign situs and cannot be taxed by the Act of a province in which it was not locally situated. On the other hand, if the tax was not imposed on property, but on the acquisition thereof as a succession duty, then it was an indirect tax and not within any of the classes of subjects enumerated in s. 92, sub-s. 2, of the Act of 1867. Reference was made to *Citizens' Insurance Co.* v. *Parsons* (1); *Attorney-General for Quebec* v. *Reed* (2); *Bank of Toronto* v. *Lambe* (3); *Brewers and Maltsters' Association of Ontario* v. *Attorney-General of Ontario* (4); *Harding* v. *Commissioners of Stamps for Queensland* (5); *Blackwood*

(1) (1881) 7 App. Cas. 96.
(2) (1884) 10 App. Cas. 141, 143, 144.
(3) (1886) 12 App. Cas. 575.
(4) [1897] A. C. 231.
(5) [1898] A. C. 769.

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v. *Reg.* (1); *Henty* v. *Reg.* (2); *Macleod* v. *Attorney-General of New South Wales.* (3)

Sir R. Finlay, K.C., and *Ingersoll, K.C.*, for the respondent, contended that under the circumstances of the case, the bona fide possession of the properties transferred not having been assumed by the transferees to the exclusion of the donor, and only contemplated from the date of his death, those properties were liable to duty as claimed. The legislation in question was intra vires the Ontario Legislature. The duty claimed was not a tax on property, but a tax on the devolution or succession. The duty was imposed on persons beneficially entitled by virtue of the will of the deceased or by virtue of the testamentary transfers made by him in his lifetime to take effect at his death. The persons taxed were resident in the province and were directly liable for the duty under s. 5, sub-s. 3, and s. 4 of the Act of 1897. The Act in question, therefore, is "direct taxation within the province in order to the raising of a revenue for provincial purposes" within s. 92, sub-s. 2, of the British North America Act, 1867. Reference was made to *Hodge* v. *Reg.* (4); *Bank of Toronto* v. *Lambe* (5); *Dow* v. *Black.* (6)

Danckwerts, K.C., replied.

1908 *July* 31.

The judgment of their Lordships was delivered by

LORD COLLINS. The question on these appeals is as to the right of the Attorney-General of the province of Ontario to demand payment of a tax, called in the provincial Act (7) which imposed it "succession duty," upon personal property locally situate outside the province and alleged by him to form part of the estate of a deceased domiciled inhabitant of the province, one Samuel De Veaux Woodruff. This question involves the consideration of two separate transactions, or sets of transactions, whereby the deceased divested himself, or assumed to divest himself, of certain personal property locally situate in the State of New York. The first of these transactions took place in 1894,

(1) 8 App. Cas. 82, 93.
(2) [1896] A. C. 567, 571.
(3) [1891] A. C. 455.
(4) (1883) 9 App. Cas. 117.
(5) 12 App. Cas. 575.
(6) (1875) L. R. 6 P. C. 272.
(7) The Succession Duty Act (Rev. Stat. Ont., 1897, c. 24).

the second in 1902. The deceased died on October 28, 1904, domiciled, as above stated, in the province of Ontario.

The present suit was brought by the Attorney-General in February, 1906, to have it declared that the property comprised in the said transactions of 1894 and 1902 (as well as certain other property described as "the homestead property") was improperly omitted from a certain affidavit to lead probate filed by the first three defendants (appellants) as executors of the said S. De V. Woodruff in the Surrogate Court, and claiming an account of the dutiable value of the said property and payment of the amount of the succession duty thereon. The action was tried before Falconbridge, Chief Justice of the King's Bench Division of the High Court, who on January 5, 1907, held that the homestead property, which had been settled on the testator's wife and his son H. K. Woodruff, was improperly omitted from the affidavit, but that the property comprised in the transactions of 1894 and 1902 was not improperly omitted from the affidavit, and as the value of the homestead property, added to the estate disclosed, did not bring the property up to the minimum value fixed by the Succession Duty Act for payment of duty in the case of property going to a wife and children, he dismissed the action. On appeal to the Court of Appeal for Ontario the decision of the trial judge as to the homestead property and the transaction of 1894 was affirmed, but was overruled as to the transaction of 1902; and as to the amount comprised in the latter the defendants were held liable to pay succession duty. No question has been raised before their Lordships as to the homestead property, but both parties have appealed as to the transactions of 1894 and 1902, the defendants seeking to set aside the decision against them as to the transaction of 1902, and the plaintiff, by way of cross-appeal, claiming duty in respect of the transaction of 1894. Though this latter claim arises by way of cross-appeal only, and the main appeal is by the defendants in respect of the transaction of 1902, it is perhaps more convenient to take them in chronological order and begin with the transaction of 1894.

In that year the Mercantile Safe Deposit Company in New York City held in their custody for Samuel De V. Woodruff bonds and

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debentures issued by various municipalities in the United States, and transferable by delivery, amounting in value to about $213,000. He arranged with the United States Trust Company of New York that they should take over the custody of these securities to be held by them in trust to carry out the terms of certain deeds to be executed by each of his four sons. He then, in company with his son H. K. Woodruff, went to New York, taking with him four trust deeds executed by his four sons respectively, and delivered these deeds with four parcels of the securities, one parcel appropriated to each deed, to the Trust Company to hold under the terms of the trusts so created. These trusts were for the benefit of each of the sons respectively during his life and for his children after him in equal shares. During the life of Samuel De V. Woodruff the income derived from these securities was sent by the Trust Company half-yearly to the sons respectively by cheques on a New York bank. These cheques were sent on by the sons to S. De V. Woodruff, who returned to each of them $1500 per annum. The evidence was that there was no agreement, arrangement, or bargain of any kind between the father and the sons that he should receive this income or any portion of it, and that this action on the part of the sons was entirely voluntary. Falconbridge C.J. held as to the transactions both of 1894 and 1902 that the Act did not "extend to this particular property situated in the State of New York . . . . and governed by the laws of New York," and that, in the view he took of the case, the intentions and motives of the testator and his sons were not in issue.

The subject-matter of the transfer of 1902 consisted of similar bonds or debentures, also then in the custody of the Mercantile Safe Deposit Company, New York, and a cash balance in the hands of Messrs. E. D. Shepard & Co., bankers, New York City, the proceeds of collections of interest they had made for S. De V. Woodruff, together with certain coupons and bonds in their hands for collection, amounting in all to a par value of about $443,257. By written directions from S. De V. Woodruff to the Safe Deposit Company and Messrs. Shepard respectively the above securities were in August, 1902, transferred in their books into the names of his three sons, and in the case of his safe

in the custody of the Safe Deposit Company into the names of his three sons and his wife. The securities remained thus locally situate in the State of New York until the death of S. De V. Woodruff in October, 1904. As has been above stated, the trial judge made no distinction between the 1894 and the 1902 transactions. He treated them both as falling outside the scope of the provincial Act. The majority of the Court of Appeal, however, held that the second of the two transactions fell within the Act, while they affirmed the view of the trial judge as to the first. Meredith J.A. held that both were alike covered by the Act.

In the opinion of their Lordships no sound distinction in point of law can be made between the two transactions. They both were concerned with movable property locally situate outside the province, and the delivery under which the transferees took title was equally in both cases made in the State of New York.

While, therefore, their Lordships agree with the decision of the majority of the Court of Appeal, confirming as it does that of the trial judge, as to the earlier transaction, they are unable to follow their view of the latter one. The pith of the matter seems to be that, the powers of the provincial Legislature being strictly limited to "direct taxation within the province" (British North America Act, 30 & 31 Vict. c. 3, s. 92, sub-s. 2), any attempt to levy a tax on property locally situate outside the province is beyond their competence. This consideration renders it unnecessary to discuss the effect of the various sub-sections of s. 4 of the Succession Duty Act, on which so much stress was laid in argument. Directly or indirectly, the contention of the Attorney-General involves the very thing which the Legislature has forbidden to the province—taxation of property not within the province.

The reasoning of this Board in *Blackwood* v. *Reg.* (1) seems to cover this case.

Their Lordships will therefore humbly advise His Majesty that the appeal of the defendants should be allowed and the cross-appeal of the plaintiff dismissed, that the judgment of the

(1) 8 App. Cas. 82.

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Court of Appeal should be set aside with costs, and the judgment of Falconbridge C.J. restored.

The cross-appellant will pay the costs of the appeals.

Solicitors for appellants: *Harrison & Powell.*
Solicitors for respondent: *Freshfields.*

[PRIVY COUNCIL.]

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WILLIAM JOSE AND OTHERS . . . . . DEFENDANTS;

AND

METALLIC ROOFING COMPANY OF CANADA, LIMITED . . . . . } PLAINTIFFS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Action against Trade Union—Actionable Conspiracy—Misdirection—Resolutions of Union calling a Strike.

In an action against the appellants alleging that they had conspired to injure the plaintiffs in the conduct of their business, and that in pursuance of the conspiracy the union whom they represented caused the plaintiffs' men to go out on strike, the judge in effect directed the jury that if the resolutions of the union calling out the plaintiffs' men were the cause of the strike they were an actionable wrong, without regard to the motive and without regard to the conspiracy alleged:—

Held, that this direction could not be supported and that there must be a new trial.

APPEAL from a judgment of the Court of Appeal (April 22, 1907) affirming a judgment of a Divisional Court (May 1, 1906) which dismissed an appeal from a judgment of MacMahon J. (November 10, 1905) based on a verdict by a special jury.

The appellants were sued on behalf of themselves and all other persons constituting Local Union No. 30 Amalgamated Sheet Metal Workers' International Association or Alliance and all other persons constituting the Amalgamated Sheet Metal

* *Present:* LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

Workers' International Association or Alliance. That association is composed of a number of local unions of sheet metal workers in various parts of the United States of America and Canada and has its head office at Kansas City. The association and its local unions are trade unions, but are not registered under the Trade Unions Act (Revised Statutes of Canada, c. 131), and they are constituted and administered under the constitution, rules, and general principles of the association and the charters and by-laws of the local unions respectively.

Local Union No. 30 Amalgamated Sheet Metal Workers' International Association or Alliance is composed of sheet metal workers in the city of Toronto. Its members, some of whom are appellants, were working in various shops in that city, including the shop of the respondents, when the disputes with the respondents arose.

The respondents claimed damages and an injunction on the ground that the defendants and the persons constituting the said Local Union and International Association entered into a conspiracy to harass, intimidate, and annoy the plaintiffs and injure them in the conduct of their business, and that calling the men out on strike when the men were satisfied with their positions, threatening and intimidating customers, preventing the sale of their goods, and other proceedings of a like nature were acts done pursuant thereto.

The appellants denied the conspiracy and malice. They justified their proceedings on the ground that they were anxious to protect and assist the respondents in every way consistent with earning a living wage, and with that view had acted for the one purpose of safeguarding the rules of their trade and furthering their legitimate interests as workmen.

MacMahon J. at the trial directed the jury as stated in their Lordships' judgment, and thereafter the jury answered the questions submitted to them as follows:—

1. "Were the workmen of the plaintiff company wrongfully and maliciously coerced to leave its employment by the defendants, or any of them?"—Answer: "Yes."

2. "If you answer the above question in the affirmative, state which of the defendants induced them?"—Answer: "By motion

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of Local Union No. 30, and indorsed by International as the parent society."

3. "Did the defendants conspire by threats or intimidations to induce the plaintiffs' customers, who would otherwise have dealt with the plaintiffs, to refrain from dealing with them, and did they in consequence refrain?"—Answer: "Yes."

4. "Did any of the plaintiffs' workmen who were members of the union vote for the resolution to call out the union workmen from plaintiffs' shops?"—Answer: "We cannot tell from the evidence."

5. "If you answer in the affirmative, can you say how many of them voted for such resolution?"—Answer: "Cannot answer."

6. "If you find that plaintiffs are entitled to recover damages by reason of the defendants' acts, at what sum do you assess such damage?"—Answer: "$7500.00."

Thereupon the judgment was recorded against the appellants individually and as representing all persons who on August 7, 1902 (the date of the strike), constituted the Local Union and the International Association respectively for $7500.00 damages and costs, and that the property and assets of the Local Union and the International Association respectively were liable to satisfy the same, with a perpetual injunction.

In his memorandum of judgment MacMahon J. stated: "I have examined the authorities cited on the argument on the plaintiffs' motion for judgment, but have been unable to distinguish this case from *Quinn* v. *Leathem* (1), and sub nom. *Leathem* v. *Craig*." (2)

Rufus Isaacs, K.C., and *J. G. O'Donoghue*, for the appellants, contended that the trial judge misdirected the jury as to the grounds on which they might conclude that workmen of the respondents were wrongfully coerced by the appellants. They referred to the passage cited in their Lordships' judgment. They contended that there was no evidence of the appellants having committed or caused any breach of contract with the respondents or any infringement of the respondents'

(1) [1901] A. C. 495. (2) [1899] 2 I. R. 667.

rights. Their real object was to advance their own legitimate interests as organized workmen. Any injury sustained by the respondents was strictly limited by that object and was not occasioned by malice. The case differed essentially from *Quinn* v. *Leathem*. (1) Reference was made to *Allen* v. *Flood* (2) and Lord Herschell's observations on the use of words of coercion, threats, and intimidation. The cases as to the rights of unions have been considered in *Denaby and Cadeby Main Collieries* v. *Yorkshire Miners' Association*. (3) There is not a word in the summing up directing the jury as to what constitutes actionable conspiracy. See also *Bulcock* v. *St. Anne's Master Builders' Federation*. (4)

H. A. Lovett, K.C., and *W. N. Tilley*, for the respondents, were directed by their Lordships to confine the argument for the respondents to the point taken as to misdirection of the jury by the trial judge. They contended that there was ample evidence as to conspiracy and that there was an ascertained and admitted state of facts which rendered it unnecessary to remit the case to another jury. If the passage relied on as misdirection was defective, a later passage in the charge expressly directed the jury that there must be wrongful and malicious coercion. If it was necessary to shew malice, there is a finding that the workmen were maliciously coerced to leave the respondents' employment, and it follows that the other acts done were on the same basis. They referred to *Quinn* v. *Leathem*. (5)

Counsel for the appellants were not heard in reply.

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July 30.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This litigation arises out of a strike of workmen in the employment of the plaintiffs (respondents) and other proceedings following thereupon. The strike is the only matter which their Lordships think it necessary to deal with on this appeal.

The plaintiffs were manufacturers employing workmen in their business. The defendants (as the suit was ultimately

(1) [1901] A. C. 495.
(2) [1898] A. C. 1, 128.
(3) [1906] A. C. 384.
(4) (1902) 19 Times L. R. 27.
(5) [1901] A. C. 495, 505, 508.

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constituted) were eight persons, sued on their own behalf, and on behalf of the members of a local Toronto trade union, and also on behalf of the members of another union of wider scope.

The statement of claim alleged that the defendants had conspired to injure the plaintiffs in the conduct of their business; and the first complaint was that, in pursuance of the conspiracy, the union called out the plaintiffs' men, who, in obedience to the call, went out on strike.

The case went for trial, and was heard before MacMahon J. and a jury. There was no doubt that the strike took place, and no doubt that there were resolutions of the unions directing the strike. The question relating to it was whether there was any right of action in respect thereof against the defendants.

The learned judge in charging the jury said to them: "I am going to ask you, in the questions which I am submitting, whether any of the union men who were in the plaintiffs' employment left the employment of their own volition, of their own free will, and without any regard to the resolution that was passed by the union, because, if they did that, that was within their right. But if they left through the resolution that was passed, which provides that within a certain number of days, if the agreement was not signed, they would be called out, and forced to leave the plaintiffs' employment, then there was an illegitimate exercise—that was a power that ought not to be exercised as against the Metallic Roofing Company. And if it was exercised to their detriment, then the union is liable in damages."

The same view is expressed in subsequent passages of the learned judge's charge, and their Lordships think that these passages cannot but have meant to the jury that the calling out of the men on strike by resolutions of the unions, if those resolutions were the cause of the strike, was an actionable wrong, without regard to motive, and without regard to the conspiracy alleged. That is a ruling which, in their Lordships' opinion, cannot be supported.

It was contended, however, that at the close of the trial, before the case went to the jury, the learned judge corrected any misapprehension which might have arisen from his earlier

rulings. What passed is thus recorded: "I have asked you, gentlemen of the jury, in the first question, were the workmen of the plaintiff company wrongfully and maliciously coerced to leave its employment by the defendants or any of them? Now, if you answer that question in the affirmative, that negatives that the union were doing what they did in their own interest, because they were doing something that was manifestly wrong."

Their Lordships think that what has been cited is insufficient effectively to correct the previous misdirection.

On the ground of the misdirection already pointed out, their Lordships think that the verdict and judgment cannot be supported. They will, therefore, humbly advise His Majesty that the appeal should be allowed, that the judgments below should be discharged and a new trial had, that the respondents should pay the costs in the Court of Appeal and in the Divisional Court, and that the costs of the first trial should abide the result of the new trial.

The respondents will pay the costs of this appeal.

Solicitors for appellants: *Fox & Preece.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.* 1908 July 16, 17, 30.

SHEA . . . . . DEFENDANT;

AND

REID-NEWFOUNDLAND COMPANY . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

Law of Newfoundland—St. John's Street Railway Act, 1896, *s.* 42—*Construction—Conditional Power to remove Snow from Railed Tracks—Implied Obligation to remove Snow from the Streets.*

The respondents were empowered by s. 42 of their charter to remove snow and ice from their tracks so as to enable them to operate their cars, conditioned upon their levelling the said snow and ice on each side of the tracks to a uniform depth to be determined by the appellant's engineer and so as not to impede the ordinary traffic of the streets:—

Held that, if removal of some of the snow from the streets was necessary to comply with the engineer's undisputed requirement as to level, such removal, though not expressly prescribed, must be effected by the respondents, as physically necessary to the fulfilment of the condition.

APPEAL from a judgment of the Supreme Court (March 1, 1907) which dismissed (the Chief Justice dissenting) a motion to set aside a judgment of Johnson J. (April 16, 1906) whereby the appellant was ordered to pay to the respondents $274, the amount of a verdict by a special jury. The respondents are a railway company operating a line of railway across the island of Newfoundland, and also are assignees of the St. John's Street Railway, which was incorporated by the Newfoundland St. John's Railway Act, 1896 (60 Vict. c. 20); and they sued the appellant as representing the municipal council.

The question decided in the appeal was as to the true construction and application of s. 42 of 60 Vict. c. 20, set out in their Lordships' judgment.

The appellant contended that the respondents were bound under s. 42 to level all the snow, whether cast up by themselves or not, to a uniform depth to be determined by the city engineer, and whether or not it involved the removal of the snow from the

* *Present:* LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

street. He retained for that purpose moneys of the respondents in his hands, who obtained a verdict in a suit to recover them.

In appeal to the Full Court the appellant contended that the judge was wrong in directing the jury that (1.) it was not the duty of the company under the Act to deal in any way with any snow but the snow thrown up from their tracks by the ploughs and tools of the company, and if they could not separate the snow so thrown out from the natural snowfall or the snow thrown from the side-walks, they were then not bound to remove or level any snow at all, and (2.) that the company were bound under the Act to level on the street, but not to remove from the street, to a depth to be determined, the snow thrown out from the track, and if it were impossible to level the same on the street to the depth determined by the council, that then the company were not bound to level any snow at all.

The majority of the Court held that this was not misdirection.

J. A. Simon, K.C., and *Macmorran, K.C.*, for the appellant, contended that the interpretation put upon s. 42 by the trial judge was erroneous and inconsistent with the objects and provisions of the Act. The condition of clearing their railed tracks by the respondents was that they should not thereby impede the ordinary traffic of the streets, and the right to clear was dependent on the performance of the condition. That condition contemplated the respondents' liability to carry away all snow which interfered with or prevented its due performance. There was a statutory obligation to reduce the snow to a certain level, and if that involved the removal of any part of it, they were liable to effect it so as to secure the stipulated result. It was no answer to say that because the pile of snow had been increased by other persons or causes than their clearance of snow from their tracks, therefore they had a right to clear without performing the condition. It was contended that the Chief Justice's reasons for disapproving the direction to the jury were right. Reference was made to *Stone* v. *Mayor of Yeovil.* (1) The respondents have cleared their tracks in such a way as to create

(1) (1876) 1 C. P. D. 691, and in appeal 2 C. P. D. 99; S. C. 45 L. J. 657, as to the effect of the word "such" in s. 42.

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a nuisance, and the Act ought not to be so construed as to entitle them to do so.

Macmaster, K.C., H. A. Lovett, K.C., and *J. C. Hickson,* for the respondents, contended that the plain meaning of s. 42 was that the respondents were bound to level on each side of the track the "said" snow and ice, that is, the snow or ice thrown out by their plough, leveller, or tools. To give it the meaning contended for by the appellant is to impose upon the respondents additional and onerous obligations not expressed in or contemplated by the words which the Legislature has used. Had the intention been as contended for, it would have been easy to use terms apt for that purpose. Compare the terms of 60 Vict. c. 6, s. 11. It was contended that the respondents were not bound to remove from the streets any portion of the snow and ice thrown out from their tracks, but simply to level the same, the appellant council, as the road authority, being liable to remove all accumulations other than those contributed by the respondents. Unless they did so they rendered it impossible for the respondents to comply with s. 42. Reference was made to *Mader* v. *Halifax Electric Tramway Co.* (1); *City of Montreal* v. *Montreal Street Railway* (2); *City of Halifax* v. *Walker.* (3)

Simon, K.C., replied.

1908 *July* 30.

The judgment of their Lordships was delivered by

LORD ROBERTSON. This appeal comes from Newfoundland, and is concerned with certain statutory privileges and obligations of a street railway company in times of snow.

By the St. John's Street Railway Act, 1896, the respondent company were authorized to construct, maintain, and operate a street railway in the town of St. John's. The railway was constructed; and its rails lie, and are used in, a number of streets in the town.

The enabling Act contained the following section, on the construction of which the present appeal depends:—"42. The company may remove snow and ice from its tracks or any portion of them, so as to enable it to operate its cars: Provided,

(1) (1905) 37 Can. Sup. Ct. Rep. 95.
(2) [1903] A. C. 482.
(3) (1885) Cameron's Sup. Ct. Rep. 569.

however, that in case such snow or ice shall be removed from its track or disturbed or thrown out by the plough, leveller, or tools of the company, it shall be the duty of the company within forty-eight hours to level the said snow or ice on each side of the track to a uniform depth, to be determined by the engineer of the council, and so as not to impede the ordinary traffic of the streets. On November first of each year the company shall deposit with the secretary of the municipal council the sum of $500 lawful money of Newfoundland, to be used by the said council to carry out the provisions of this section in case the said company fails to do so; said sum to be refunded to said company, if not required, on the first day of May, and at no time between November and May shall said sum be less than $500."

The key to the understanding of this section is to be found by observing that it confers a licence and prescribes the conditions of that licence. The licence is to remove snow. Now, in case of snow in Newfoundland, the general traffic accommodates itself to the situation, and is carried on over the snow crust on sleighs. Accordingly the respondent company are authorized (by s. 47) to substitute sleighs for motors or cars during the winter months. But, plus this, they are allowed a further privilege, for which legislative sanction was required. They are allowed (on conditions) to break up the snow surface on which the general traffic is borne and uncover their railed track.

It is obvious that to do this involves the most serious invasion of the highway as a snow-covered road. It means the digging a trench in the snow-covered highway. This would plainly be a nuisance, which could be prevented by legal remedy. Accordingly what the Legislature has done here, by the initial words of s. 42, is to permit the removal of what forms the substance of the (snow) highway.

Here let it be observed that what is legalized is irrespective altogether of where the removed snow is taken to. Wherever the removed snow is put, the licence is required, and the resulting evil to the public, to be provided against by conditions, is the derangement of the level of the highway, which occurs no matter where the stuff is put. The section, it is true, allows

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(but does not prescribe) that the removed snow may be put on the sides of the track. But the condition which it does prescribe is equally imperative, wherever the displaced snow is taken to.

Now the statutory condition of this licence is that the snow on each side of the track shall within forty-eight hours be levelled on each side of the track to a uniform depth, to be determined by the engineer of the council of the town, and so as not to impede the ordinary traffic of the streets. In the present instance the engineer determined eight inches to be the necessary depth, and it is not disputed that this was necessary to prevent the impeding of the ordinary traffic.

The present question arises in this way. The respondent company found that they could not comply with the engineer's requirement of eight inches unless they removed some snow out of the streets altogether. This they refused to do. The council accordingly removed the snow for them; and the dispute arises on the question whether this is a good charge by the council when called on to account for the money deposited under s. 42. The action went to trial with a jury, the point of controversy being whether the respondent company were bound to pay for the cost of removing such snow as had to be got rid of in order to provide the engineer's level of eight inches. The trial judge laid down the law in unambiguous terms: "It was no part of the company's duty to remove or carry from the street any part of the said snow." This ruling was affirmed on appeal, the Chief Justice dissenting. Their Lordships are unable to support this decision.

It was proved, and indeed it is the respondent company's case, that the requirement of the engineer could not be complied with without the removal, out of the street, of this snow; and this being so, the question is whether the respondent company are not bound to remove it. On the statement, it seems obvious that they are. Their right to interfere at all with the snow on the roadway depends on their fulfilling a certain condition. If the fulfilment of a condition involves something being done, done that must be, although it is not expressly prescribed. This is not to impose an additional condition, it is merely to give effect to that which is expressed by insisting on its fulfilment,

including the performance of what is physically necessary to its fulfilment. The contrary contention simply wipes out the condition; and in the present instance gives no effect to the express requirements of (1.) compliance with the engineer's datum level and (2.) not impeding the ordinary traffic.

Some effort was made before their Lordships to create a difficulty out of the word "said," as if the duty of the respondents was by the section limited to dealing with the particular particles of snow which they had removed from their track on to the rest of the road. This argument can only be maintained by ignoring the fact that the section states the depositing of removed snow on the sides of the track merely as an alternative mode of removal. And, so far as the word "said" goes, it is (to go strictly to work) identified with the antecedent "such," which again relates to "snow," generally, in the opening and main words of the section. Meticulous criticism, however, must not be allowed a licence to wreck the enactment under consideration, whatever it may be; and the true answer to these puzzles is that the obligation arises from the company having removed the snow from their track, wherever they have put it, and in consequence of the break they have thus made in the general surface of the road, and that the enactment is directed to redressing the level thus destroyed. As already pointed out, the engineer is entitled to act, although no snow whatever has been put on the sides of the track.

Their Lordships will humbly advise His Majesty that the appeal be allowed, that the judgments below be set aside, and that instead thereof judgment be entered for the defendant in the action (the appellant), with costs in both Courts.

The respondents will pay the costs of the appeal.

Solicitors for appellant: *Burn & Berridge.*

Solicitors for respondents: *Norton, Rose, Barrington & Co.*

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May 20, 21, 22, 27; *July* 3.

IBRAHIM ESMAEL AND OTHERS . . . . . DEFENDANTS;

AND

ABDOOL CARRIM PEERMAMODE AND OTHERS . . . . . PLAINTIFFS.

IBRAHIM ESMAEL AND OTHERS . . . . . DEFENDANTS;

AND

ABOO BAKAR MAMODE TAHER AND OTHERS. PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS.

Mahomedan Law—Administration of Wakf Estate—Rights of Wakifs—Practice of Court—Scheme of Administration—Charter of Incorporation superseded.

The wakf properties in suit, situate at Port Louis, in the island of Mauritius, were as to a considerable portion of them successively purchased from 1852 onwards "for the whole Mahomedan congregation of the island," consisting of Indian immigrants from Cutch, Hallal, and Surat, all of the Soonee school, and their descendants, and were dedicated by the deeds inalienably for the purpose of a mosque. The overwhelming majority of the congregation belonged to the Cutchee class, and in 1877 the deeds of purchase for the first time declared that the properties comprised therein were bought on behalf of the Cutchees, a committee of whom was to administer them and all the other properties belonging to the mosque. Later purchases were expressed to be made, some on behalf of the Cutchees, others on behalf of the congregation. In 1903 two deeds were executed by a body of Cutchees by which they formed themselves into a society afterwards incorporated under Ordinance 22 of 1874 for certain pious and charitable purposes, declared that they brought into the society in full ownership all the said purchased properties, with extensive powers of selling and letting the same, other than the mosque and its accessories, of which latter they reserved to themselves the exclusive management.

In actions brought respectively by the Hallaye and Soortee classes the Court below ordered both deeds to be set aside so far as they gave exclusive administration as of right to the Cutchees, and substituted for the portion thus set aside a scheme giving to the plaintiffs a share in the administration, but subject to future modifications:—

Held, in appeal, that as the deeds could not be maintained consistently with the rights of the plaintiffs they should be set aside in toto.

Held, further, that as the charter of incorporation in consequence

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* *Present:* LORD MACNAGHTEN, LORD ATKINSON, SIR J. H. DE VILLIERS, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

became inoperative, the amending scheme must also be set aside. The Court could neither grant a new charter nor under the circumstances amend the superseded one.

CONSOLIDATED appeals from two decrees of the Supreme Court (June 25, 1906) cancelling and setting aside two instruments dated in 1903 whereby provision was made for the management of the chief mosque at Port Louis and for the administration of certain properties held in connection with the mosque.

The first instrument was an agreement entered into between the appellants and numerous other Cutchee Mahomedans for the management of the mosque; the second was a notarial deed of society whereby certain properties held in connection with the mosque and admitted on all hands to be wakf or property dedicated to pious and charitable uses were vested in the appellant society, which was constituted by the deed with a view to its incorporation, and which subsequently was incorporated by Government proclamation.

The respondents in the two appeals were Hallayes and Soortees respectively, and they attacked the two instruments in question on the ground that they provided for exclusive administration by the Cutchees and in their interests, alleging that the mosque as well as all immovable properties in the deed of society had been acquired by the contributions of all the Mahomedans of Mauritius, including the two classes represented by themselves. The properties consequently belonged beneficially to the whole Soonee Mahomedan congregation, including all who were members thereof at the date of acquisition and all who might subsequently become members. They contended that the two instruments were illegal, null, and void, and prayed that the Court would settle a scheme for the future management of the whole religious foundation.

The defendant Cutchees claimed an exclusive right thereto. They claimed to have been the wakifs or creators of the trust, entitled by Mahomedan law as understood in the island to the management; otherwise that by virtue of their services in connection with the wakf they occupied by tacit consent of the congregation a special position entitling them to special consideration, and that in equity they should be maintained in that

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position until forfeited by misconduct. They claimed that in entering into the formal agreement complained of for the administration of the wakf exclusively by their caste they merely affirmed a well-known and existing position, and that in getting themselves incorporated and having the wakf property vested in them they were taking the best measures to protect the property and secure to the beneficiaries the fulfilment of the trusts.

The Supreme Court found that the properties in suit were wakf, that both its creators and beneficiaries must be taken to be a de facto association of members of the Mahomedan congregation; that the position of the managers was that they had a tacit mandate from the members, but no inherent right as a caste; that the two deeds impugned by the suits constituted a flagrant breach of the tacit agreement by which the defendants had been allowed to administer the wakf and were ultra vires; and that their administration had been intelligent and successful. It then proceeded :—

"We would unhesitatingly have maintained the administration such as it existed prior to the passing of the impugned deeds had we not been satisfied that in view of the unwarranted action of the administrators as evidenced by those deeds they have given just cause to their co-religionists to ask that the system of administration be modified.

"We have of course, being of the opinion stated above on the points touched upon, necessarily set aside the two deeds in so far as they purport to give to the Cutchee caste the exclusive administration as of right of the mosque and its accessories and to place at the disposal of an exclusively Cutchee society distinct from the mosque the remainder of the wakf property.

"As a consequence of this decision we had to decide how the mosque is to be administered.

"That the administration must be a Soonee administration is to us clear, for though there are no sectarian differences between the various castes of Soonees in the Colony there are differences between the Soonee and other sects who in fact have provided themselves with mosques of their own. The Cutchees Soortees and Hallayes are the most prominent and influential sections of

the Soonee school and may be said to be thoroughly representative of the Mahomedan congregation for whose benefit the wakf has been created. The proper course would we think be to incorporate the Soonee Mahomedans, and when they are incorporated to entrust the management of the wakf to the society. We have been told that this would be difficult owing to anticipated opposition in the Council of Government. On the other hand it has been pointed out that there is ample precedent for incorporation of religious societies, and that it is overrating difficulties to anticipate that incorporation will be refused to a Mahomedan community for whose benefit property is known to exist, requiring to be administered in connection with their religious worship and pious works, when such incorporation has been invariably granted to other religious communities. Be that as it may, letters of incorporation cannot be granted by this Court, so we must consider other measures.

"We have been asked to maintain the status quo ante as regards the administration with restrictions as to disposal of wakf property. Having set aside the two deeds for the reason we have stated we cannot of course act upon this suggestion. We have fully recognized the services rendered to the mosque by the Cutchee Maimans firm. They have not it is true by drawing upon their own pocket but by intelligent organization and management brought the wakf to its present satisfactory condition. They have in a sense as administrators created the great wealth of the mosque, and it is we think right despite their final fault that they should continue to hold an important position in the management. But we on the other hand are satisfied that they should not stand alone as managers. The other two castes should also be represented in the administration so that they may know what is being done, may express their views, and may guard against any relapse on the part of the Cutchees in their tendency to assume exclusive rights. We have therefore thought it expedient to maintain the committee of Cutchees appointed by the Cutchee constituents in the two deeds we have notified whilst adding to them three representative Soortees and one representative Hallaye and so ordering that any licensed Soonee Mahomedan may acquire knowledge of what is being done if he so desires.

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The Cutchees will be in a majority on the committee of seven to four, but, the Court reserving the right of modifying the composition of the committee and system of administration on sufficient cause shewn, if the majority abuses its power or if circumstances materially change after hearing all interested parties other arrangements can be made. We have however stated that this arrangement is pending the formation of an incorporated society of all Soonee Mahomedans in whom the property can be lawfully vested. Should such a society be formed we would have to consider the expediency of transferring to it the administration now provided for."

Sir R. Finlay, K.C., and *J. B. Matthews*, for the appellants, contended on the evidence that the wakf was founded exclusively by Cutchees, that they provided the money wherewith the mosque was built and the properties were purchased. If the classes represented by the respondents subscribed at all, their subscriptions were merely to assist the Cutchees, and did not constitute them co-founders of the mosque or its endowments. It was not proved that in 1852, when the mosque was founded, there were any Soonee Mahomedans in the island other than Cutchees. There was no evidence that the words "the whole Mahomedan congregation in the island," as used in the earlier deeds of purchase, were meant to comprise any other classes than Cutchees. The respondents were admitted as a privilege and not as a right, and consequently could not question the appellants' exclusive right of management. On the assumption that the trust was for the whole Mahomedan congregation of the island it was contended that that trust was invalid and unenforceable. By the Civil Code, arts. 900, 910, and 937—and see Ordinance 22 of 1874, s. 16—donations in favour of establishments of public use can only take effect if they have been authorized by Imperial decree. Until incorporation under Ordinance 22 of 1874 there was no community of Mahomedans authorized to be beneficiaries. Declarations of trust for the whole Mahomedan congregation were not merely invalid at the time when they were created as being in disregard of the provisions of the Civil Code; they were also contrary to the provisions of the Penal Code: see Ordinance No. 6 of 1838,

art. 210, which prohibits certain associations unless formed with the sanction of Government and subject to conditions imposed by it. See also art. 212 and Ordinance No. 13 of 1898, which for the first time authorized the Governor to exempt any religious sect from the penal provisions referred to. They referred to Laws of Mauritius, collected by Piggott and Thibaud, vol. iii. pp. 1057, 1076, 1077; vol. ii. p. 415; the Penal Code, art. 184, p. 410, and Ord. 13 of 1898, p. 484. Then the Civil Code speaks throughout of persons as the subjects of civil rights: see arts. 902, 1101, 1123, and 1832. Person is not defined in the Code, but the authorities are agreed that it includes artificial persons created by the sovereign power. The only person capable of being interested in the wakf properties was the incorporated society to which the appellants belong, which was called into existence in 1903. Reference was made to *Moreau* v. *Houdbert*, Sirey, 1861, part 1, pp. 615, 616; Laurent, Principes du Droit Civil Français, vol. i. pp. 367, 368, 369, arts. 287, 288 (des personnes civiles); Fuzier Herman, Annotation to Code Civile, vol. i. p. 60, notes 1 to 13, under art. 7 of Code Civile (des personnes morales); vol. ii. p. 441, under art. 902, notes 3, 42—46, and 52. See also *Lacordaire's Case*, Sirey, 1870, part 1, p. 342; Sirey, 1875, part 2, p. 71; Sirey, 1858, part 1, pp. 225, 228; Dalloz, 1858, part 2, p. 49. The law of Mauritius with respect to civil or moral persons and to religious associations rests exclusively on the Civil Code as it stood in 1810 as modified by Ordinance 22 of 1874, and by that law, it was submitted, the respondents' actions would not lie.

J. E. Bankes, K.C., and *A. M. Bremner*, for the respondents, contended that the evidence shewed, as found by the Supreme Court, that the mosques and other properties in suit were bought on behalf of the whole Mahomedan congregation of the island and with moneys contributed or obtained by that congregation. So far as they were purchased by the Cutchees it was as agents for the whole congregation to be held on behalf of all its members. The whole congregation were creators of the wakf and as wakifs were entitled to the benefit and enjoyment of the mosque and other properties, and all were entitled to share in its management and administration. The evidence shewed that they had always

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been maintained by the contributions of the Hallayes and Soortees as well as by the Cutchees, and that the management by the Cutchees was with the tacit assent of the congregation, and not by virtue of any exclusive right. The appellants had no right to include the properties in suit in the stock or fund of the society which they formed in 1903, or to attribute to themselves alone the administration and disposal of the same, without the participation of the respondents and other members of the congregation, or to constitute themselves trustees for that purpose. The transfer of the wakf properties to the new society was a breach of trust, illegal and wrongful, and accordingly the Supreme Court was right in setting aside both deeds. It was further contended that there was nothing contrary to the law of Mauritius in the whole congregation holding property and in their suing or being sued in respect thereof. Reference was made to Dalloz, Répertoire, vo. Société, No. 112; vo. Action, No. 202; Sirey, 1884, part 1, p. 215; 1858, part 1, p. 226; 1868, part 2, p. 277; Dalloz, 1876, part 1, p. 115; 1887, part 1, p. 289 (note).

Sir R. Finlay, K.C., replied.

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The judgment of their Lordships was delivered by

SIR J. H. DE VILLIERS. These are consolidated appeals from a judgment of the Supreme Court of Mauritius setting aside two instruments by which provision was made for the management of the chief Mahomedan mosque at Port Louis and for the administration of certain properties held in connection therewith. The history of the mosque goes back to the year 1852. In that year nine Mahomedan merchants purchased two properties in Queen Street "for the whole Mahomedan congregation of the island of Mauritius," of which they declared themselves to be "les fondés de pouvoirs spéciaux." By the deed of purchase the purchasers, declaring themselves to be the mandataries of the other Mahomedans, prohibited any alienation of the properties and declared that the land was to be devoted to no other uses than the erection of a building consecrated to the Mahomedan worship. On the properties so purchased a small mosque was erected about the year 1853. From time to time adjoining properties were bought by Mahomedan merchants,

the purchasers declaring that they bought as well for themselves and in their own names as for the whole Mahomedan congregation. As the Mahomedan community increased in numbers and in wealth the mosque was enlarged and embellished, until it became the chief place of Mahomedan worship in the island. It is admitted on both sides that the worshippers in the mosque belonged to the school of Soonees, and that they mainly consisted of three classes, known as the Cutchee Maimans, the Hallaye Maimans, and the Soortees. These were all immigrants, or descendants of immigrants, from India, and they derived their distinctive names from the localities from which they came. Thus the Cutchees were inhabitants, or descendants from inhabitants, of Cutch, the Hallayes were descendants from inhabitants of Hallal, also called Kattiawar by some of the witnesses, and the Soortees were descendants from Mahomedans of Surat, or adjacent parts of Guzerat. At the time when the congregation was first formed and the mosque erected the overwhelming majority belonged to the Cutchee class. Merchants of that class took a great interest in their religion, and probably contributed the greater part of the funds required for the purchase of the land and the erection of the mosque, but, as already pointed out, they purported to act on behalf of the whole congregation. In 1877 two additional properties were bought, and in the deeds of purchase the purchasers—for the first time in the history of the mosque—declared that the purchases had been made on behalf of the Cutchees, and that a committee of Cutchees was to administer the property thus bought and all the other properties belonging to the mosque. Similar declarations were made upon the subsequent purchases of some additional properties. As to this, the learned judges in the Court below, in the reasons for their judgment, say: "This new departure—it has been admitted by counsel for the defendant Cutchees—was dictated by a fear that the Soortees, who were increasing in numbers, wealth, and power, might claim a right to interfere in the management of the mosque and its adjunct property under the broader terms of the previous purchases." The practice of purchasing on behalf of the Cutchees only was not, however,

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consistently followed in the subsequent purchases, for on October 16, 1884, the attorney of one Aboo Taleb, a Hallaye, in purchasing an additional property at a judicial sale for 24,000 rupees, declared that the purchase was made "for and on behalf of the Mussulman congregation." Until the present dispute arose, the direction of the mosque and the administration of its affairs were practically in the hands of Cutchees only. In the year 1903 ninety-three Cutchees belonging to the congregation executed a notarial deed by which they formed themselves into a society consisting only of Cutchee Mahomedans, the objects of which were stated to be to assist distressed Cutchees and other poor persons of whatever religion, and to provide instruction for children. They further declared that they brought into the society in full ownership the different properties to which reference has been made, and they appointed a committee of management with very extensive powers, including those of selling and letting the properties of the society other than the mosque and its accessories and the land on which it stands. They also stipulated that none but Cutchee Mahomedans should become members of the society or have a voice in the management of its property. By another deed of the same date the same ninety-three Cutchees entered into an agreement for the administration of the mosque and the funds appertaining thereto, from which administration all but Cutchees were excluded. The society formed under the first-named deed was incorporated by proclamation issued by the Governor under the provisions of Ordinance No. 22 of 1874. Before the society was formed, some of the principal Hallaye members of the congregation were asked to join, but they refused, because as a condition of so joining they would have to class themselves as Cutchees, which they obviously could not do, and because they disapproved of the manner in which it was proposed to deal with the assets set apart for the religious uses of the congregation. As to the Soortees, they were not asked at all to join in the execution of the deeds. After the deeds had been executed, separate actions were brought in the Supreme Court of Mauritius by Hallaye and Soortee members respectively of the congregation to have it declared that the societies formed by the deeds were null and void, and to have a scheme settled

for the management of the religious foundation. The actions having been consolidated, the deeds were set aside in so far as they purported to give to the Cutchees the exclusive administration as of right of the mosque and its accessories, and a scheme was substituted for the portion thus set aside, by which three representative Soortees and one representative Hallaye were ordered to be added to the committee of seven Cutchees provided for by the deeds. Against that judgment the defendants have appealed.

The evidence taken in these cases has been most voluminous, but it has been so fully, carefully, and ably dealt with by the learned judges of the Court below that it will be unnecessary for their Lordships to do more than briefly refer to the leading facts. The outstanding fact in both cases is that the founders of the mosque drew no distinction between Cutchees, Hallayes, and Soortees, but devoted the property to the religious uses of the whole Mahomedan congregation. The majority have always been Cutchees, but from the first there were a few Hallayes, and, within a few years after the establishment of the congregation, some Soortees were added to their number, and they have considerably increased of recent years. The richest members of the congregation were undoubtedly the Cutchees, and they contributed individually in proportion to their means, but considerable contributions were made in the aggregate by Soortees as well as Hallayes. After a time a system was introduced by which a rate, "pour l'église," of two cents was levied on every bag of grain sold wholesale by leading merchants of the congregation. In this manner it came about that the Cutchees raised the greater part of the church funds, but some Hallaye merchants also raised money in that way. The burthen of the rate probably fell on the purchasers, who, for the greater part, were Europeans, but among the purchasers were also many Hallaye and Soortee members of the congregation. The money thus raised was not kept apart as a separate fund, but seems to have been mixed with the general fund of the mosque. As regards the administration of the affairs of the mosque, it was left in the hands mainly, if not entirely, of Cutchees, but their Lordships agree with the judges of the Court below that this was

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done because they were leading merchants occupying a recognized position in the commercial world, and not because they belonged to any particular class of Mahomedans.

In this view of the facts, the question arises whether, by the law of Mauritius, the plaintiffs, as members of the congregation and habitual worshippers in the mosque, are entitled to be relieved against deeds which deprived them and all other Hallayes and Soortees, for all future time, of all share in the management of the mosque, and vested the ownership of the mosque and all properties accessory thereto in a newly-formed society from membership of which they were excluded. An objection was taken on appeal, which had not been raised on the pleadings, that the plaintiffs had no right to institute the action in the absence of His Majesty's Procureur and Advocate-General, who is alleged to exercise in the Colony functions corresponding to those of the Attorney-General in England as representative of the Crown and guardian of its rights and prerogatives. No authority was, however, cited before their Lordships to shew that, in a case like the present, the joinder of such a functionary was required by the law of Mauritius. The objection, if valid, ought to have been taken before the Mauritius Court, and it really was not pressed before their Lordships. As there is nothing to shew that any prerogatives of the Crown are prejudiced by the judgment, their Lordships are not prepared to advise that it should be disturbed merely on the ground that the Crown had not been made a party to the actions. The Governor has by proclamation incorporated the society called into being by the deeds, but if the deeds are not such as can be maintained consistently with the legal rights of the plaintiffs, the Crown would appear to have no interest in maintaining them.

Upon the question whether the plaintiffs have any rights whatever in respect of the future management of the affairs of the mosque, the defendants rely, in the first place, upon the provisions of the 210th article of Ordinance 6 of 1838. That article reads as follows:—"No association of more than fifteen persons of which the object shall be to meet every day or on fixed days for the consideration of any religious or political subject (pour s'occuper d'objets religieux ou politiques) can be formed unless

with the sanction of the Government and under such conditions as the public authority shall deem necessary to impose on such society."

The 212th article imposes a penalty of 200 rupees for a contravention of the 210th article. The contention is that the congregation was a wholly illegal association, and that consequently none of its members could have any right of action in respect of any acts that are detrimental to their interests as such members. It is remarkable that such a contention should be set up after the congregation has been in existence for more than half a century, during which period no prosecution appears to have taken place against any of its members for having joined in an illegal association. It probably never entered the minds of the authorities that a congregation formed for the purposes of prayer and religious worship was necessarily an association the object of which was "pour s'occuper d'objets religieux ou politiques." Be that as it may, in the arguments of the defendants' counsel, which are fully reported in the record, not a word was said as to the illegality of the association in the sense of its being criminal. The argument there was—and this argument has been repeated before their Lordships—that under the Civil Code, which is in force in Mauritius, the technical right to hold property cannot be vested in a religious community which has not been authorized by the State, because without such authorization it has no legal existence. Now, although it is quite true that under the French law such a community does not constitute a "civil person," yet it has been held, according to Sirey ("Recueil Général," 1858, p. 225), that such a community forms among the members of which it consists a society de facto which renders those forming part of it responsible for the engagements which they have made in its interest, whether those engagements result from contract or quasi-contract. This qualification shews that the rule laid down in the Code has not always been carried out to its logical conclusions. No case has been cited in which any French Court has refused, under circumstances analogous to the present, to grant relief to the aggrieved members of an unauthorized religious community against their fellow members. The position which has arisen in the present case is unique, and

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it is no wonder that counsel for the defendants had to admit in the Court below that they could not find any law in Mauritius to meet the case. The defendants, in order to legalize their position as members of a religious community, had obtained a charter of incorporation, but in the deeds defining the rules of their new association certain other members of the congregation were excluded from membership, not because they were not de facto members of such congregation, but because they did not belong to that particular class which, owing to special circumstances, had, up to that time, had the almost exclusive management of the affairs of the mosque. The result of allowing these deeds to stand would be that, however the Hallayes or Soortees might hereafter increase, or the Cutchees might decrease, in numbers, wealth, and importance, the Cutchees will be entitled to dispose of all the property except the mosque proper, and the two other classes will have no voice whatever in the management of the mosque or of the properties accessory thereto. The defendants say that it was necessary to legalize the position of the congregation by reason of the difficulties necessarily attendant upon the administration of the immovable properties by an unincorporated body. But the only association which could claim to be legalized was the congregation on whose behalf the mosque had been founded. If a portion of the congregation chose to form a new association, they had no right to transfer all the property to such new association and exclude the rest of the congregation from membership and from participation in the management of the affairs of the mosque. If, therefore, the Supreme Court, in the exercise of its equitable jurisdiction, had set aside the deeds and gone no further, their Lordships would have had no hesitation in advising His Majesty that the appeals should be dismissed.

Unfortunately, however, the Court, in its laudable anxiety to effect a complete settlement of the dispute, set aside the deeds in part only, and for the portion thus set aside substituted a scheme which, pending the formation of an incorporated society of all Soonee Mahomedans, was to regulate the management of the affairs of the mosque. Under this scheme the committee of

management was increased in number from seven to eleven, and it was ordered that of the four additional members three were to be representative Soortees and one a representative Hallaye. The Court, however, reserved the right of modifying the composition of the committee and system of administration as the Court might deem just or necessary from time to time, either proprio motu or upon application of any Soonee Mahomedan holding a licence to trade. The result is that the scheme of management upon which the existing charter of incorporation is based has been superseded in part only by another scheme the nature of which will vary as circumstances might, in the opinion of the Court, from time to time require. It is not quite clear from the judgment whether the charter of incorporation was intended to remain in force to the extent to which the deeds were upheld. If it was intended that the charter should remain in force with the variations introduced by the Court, the difficulty would arise that the Ordinance No. 22 of 1874, under which the charter was granted, expressly enacts that the rules and regulations embodied in any charter shall not be altered or repealed except by a certain proportion of the total number of members, and then only after confirmation by the Governor in Council. If it was intended that the charter should no longer have any operation, it is difficult to conceive how the judgment of the Court, establishing a fresh scheme of management, could legalize an unauthorized religious community. The Court admitted that it had no power to grant letters of incorporation, but the judgment practically attempts to legalize one scheme of management in substitution for another scheme, which had been authorized by charter. If the Court had contented itself with setting aside the deeds as null and void, the charter, which is founded on one of these deeds, would have become inoperative, but the judgment, as actually pronounced, would encounter innumerable legal difficulties in its execution. There is a further objection to the order, namely, that there is not sufficient evidence to shew that the number of members of committee allotted to the Hallayes and Soortees respectively is in due proportion to their numbers and importance, relative to the Cutchee members of the congregation. It was admitted by the learned judges that

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until the date of the execution of the impugned deeds the Cutchee managers had satisfactorily administered the affairs of the mosque, and there seems no reason to fear that, if matters are replaced in statu quo ante, the affairs of the mosque will be maladministered. It would certainly be in the interest of all concerned that the question of future management should be placed on a satisfactory footing by means of an amicable settlement. If the members of the congregation, including Hallayes, Soortees, and Cutchees, could agree upon a scheme of management by which due effect is given to the relative importance of the three rival classes, there would probably be no difficulty in obtaining a charter of incorporation giving effect to the settlement. But until the parties themselves come to such an agreement, it is, in the view of their Lordships, impossible for the Court, with due regard to the existing law of Mauritius, to frame a scheme that is entirely free from legal objections.

The result is that their Lordships will humbly advise His Majesty that the judgment appealed from should be confirmed in so far as it cancels the two agreements of 1903 and in so far as it orders the defendants to pay the costs, but the appeal should be allowed in so far as the said judgment purports to make special provision for the administration of the mosque and appurtenances and the properties and revenue thereof.

The parties will respectively bear their own costs of these appeals.

Solicitors for appellants: *H. C. Barker & Son.*
Solicitors for respondents: *Armitage & Chapple.*

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AND

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Construction of Will—Gift to Children—Conditions in restraint of Alienation—Enjoyment of Usufruct—Grandchildren conditionally substituted—No Right of Accretion.

A testator directed that his estates should be divided into seven shares amongst his seven children, the children to have the usufruct and enjoyment of all his property, and, on the decease of his children or any of them, the children to be born of their respective marriages to have the full proprietary right and interest therein. To his grandchildren thus substituted for his children he gave the right to use, enjoy, or dispose of the same as it might seem good to them, instituting them for this purpose his universal legatees.

He prescribed three conditions: (1.) that the property bequeathed to his children should not be assignable, or capable of being seized by their creditors; (2.) that it should not be sold or alienated under any pretext, but should pass "*en nature*" to his grandchildren; (3.) that the grandchildren should not alienate the share of the property which should belong in usufruct to their respective fathers or mothers before the said usufruct had come to an end:—

Held, that the effect was that each child was entitled to his specific share which had been ascertained by partition, confirmed by 60 Vict. c. 95, as sole proprietor subject to the condition of handing it over to his children at his death; and that there was no right of accretion amongst either the testator's children or grandchildren. Consequently the share in suit of one of the children who died in 1902 without issue passed under his will to his executor.

APPEAL from a judgment of the Supreme Court (November 15, 1906) reversing a judgment of the Superior Court (October 31, 1905) sitting in review at Montreal.

The suit was for partition of all the share which Louis Roméo Prévost, deceased, took under the will of his father, Amable Cyprien Prévost, dated December 24, 1844, and sufficiently set out in their Lordships' judgment. Two of the respondents, Armand

* *Present:* LORD LOREBURN L.C., LORD ROBERTSON, LORD ATKINSON, SIR ARTHUR WILSON, and SIR HENRI ELZÉAR TASCHEREAU.

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and Adèle, were plaintiffs, as coheirs and beneficiaries under the said will. The defendants were all other coheirs, who did not contest the suit, and the respondent Lamarche in his capacity of executor of the will of Louis Roméo Prévost, who had died without issue.

The Superior Court, confirmed by the Court of review (Loranger J. dissenting), dismissed the respondents' action and declared that the share of the estate of the late Amable Cyprien Prévost enjoyed by the late Roméo Prévost was his absolute property, and that he could dispose of the same by will.

It appeared that, after having held the possession of the testator's estate as usufructuaries in common for about seven years after his death, the beneficiaries executed a deed of partition thereof amongst themselves, by which the estate was divided into seven separate shares, and since then the shares have been separately held and enjoyed by the respective beneficiaries to whom they were so allotted. The partition was declared final by a special statute enacted by the Legislature of the province of Quebec on February 9, 1897 (60 Vict. c. 95), which was confirmed by a judgment of the Court of the Queen's Bench for Lower Canada on December 23, 1897, upon an appeal taken under the Act.

The Superior Court considered the result of this to be that each heir was possessed definitively of the property willed to him, conditional solely upon his returning it to his children, and that other institutes have no interest in the property thus given to one of them.

The Supreme Court, on the other hand, held that there was accretion in favour of the children and grandchildren in case of the death of any of the children without issue; that the will in creating one substitution in favour of the grandchildren jointly, whom the testator made his universal legatees, did dispose by way of accretion of Roméo's share, who died without issue, in favour of the surviving co-legatees; that by the terms of the disposition itself of the will, there should be accretion, and that the position thus given to the legatees was confirmed by art. 868, Lower Canada Civil Code, which is in these terms:—

"Accretion takes place in favour of the legatees in case of

lapsed legacies when such legacies are made in favour of several persons jointly.

"They are held to be so made when they are created by one and the same disposition, and the testator has not assigned the share of each co-legatee in the thing bequeathed. Directions given to divide the thing jointly disposed of into equal aliquot shares do not prevent accretion from taking place."

The Supreme Court further held that the statute 60 Vict. c. 95, and the following judgment, simply declared that the partition was final and definitive without changing the dispositions of the will and without modifying the order of transmission of the substitution created by the will; that the statute declared in its preamble that Mr. Prévost has made only one substitution in favour of his children and grandchildren (and not seven substitutions); that it did not abolish the substitution as created by the will, but on the contrary declared that the partition is subject to the substitution as created by the will. It further held that a legacy made to children in usufruct and to the grandchildren in property has lapsed, as far as both institute and substitutes are concerned, when the institute dies without issue before the opening of the substitution.

Thereupon, the executor Lamarche having declined to take further proceedings, the appellants, being one of the defendants and some creditors of the deceased Louis Roméo Prévost, obtained special leave by Order in Council dated August 2, 1907, to enter and prosecute this appeal.

C. J. Doherty, K.C., and *Lafleur, K.C.*, for the appellants, contended that the judgment of the Superior Court was right and that the Supreme Court had misconstrued the will of 1844 and misapplied art. 868 of the Code. By the true construction of the will it was contended that the sons and daughters of the testator were co-universal legatees. They were to take the proprietary right in their specific shares, subject to the condition of handing it over to their children if any. If any one of them died without issue the disposition in his favour did not lapse, but the subsequent condition could not be performed. The result was that the full ownership of his share vested in him at his death.

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No benefit of survivorship accrued at his death to his surviving brothers and sisters or their children. Neither by express terms nor by necessary implication was any benefit of survivorship or right of accretion created by the testator. Art. 868 applies to cases where one of the joint legatees fails to take, and the legacy in his favour lapses, not to the case of a conditional substitution where the condition does not happen. The legacy in favour of Louis Roméo did not lapse, but produced its full effect since the condition as to handing it over failed. They relied on 60 Vict. c. 95, which declared that the institutes under this will were sole proprietors subject to the said condition, and referred to *De Hertel* v. *Goddard*. (1)

Brosseau, K.C., for the respondents, contended that the judgment of the Supreme Court was right. The intention of the testator was to keep his estate in his family until the second generation after him ; and if all his children died without issue there was a second substitution contained in the will in favour of his collaterals. It was entirely contrary to his intention as collected from the terms of his will that the share of any one of his children should pass to his creditors or strangers. Louis Roméo's will was therefore invalid. He had no disposing power. By his death without issue his share accrued to his co-legatees in usufruct and to their children in property. Art. 868 was relied upon. Louis Roméo's legacy failed or lapsed by reason of his death without issue before the opening of the substitution. Up to the time of his death it was valid, but it lapsed at his death without issue, and accretion took place both by force of art. 868 and the terms of the will. *De Hertel* v. *Goddard* (1), if relevant, was decided on a substitution which opened before the Civil Code came into force. When the will is examined in all its provisions it appears that the testator created two substitutions ; one was in favour of his grandchildren, whom he named his universal legatees ; the other was a subsidiary substitution to meet the case of all his children dying without issue, and was in favour of his widow as usufructuary and his brother and sisters or their issue as substitutes. The legacies both to institute and substitutes were joint. No share was assigned in either case. Consequently the

(1) (1896) 66 L. J. (P.C.) 90.

right of accretion accrued to the survivors on the death of one of the institutes without issue. He cited several passages from Sirey (1893, pt. 1, p. 438; 1892, pt. 1, p. 516; 1839, pt. 2, p. 46; 1841, pt. 1, p. 851; 1833, pt. 1, p. 35): see Dalloz, 1893, pt. 2, p. 314; Pothier, Traité sur Les Testamens, c. 6, s. 5, par. 3, p. 151; Demolombe, Traité des Successions, vol. 5, p. 338, No. 283.

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Doherty, K.C., replied.

The judgment of their Lordships was delivered by

1908 *July* 31.

LORD ATKINSON. This is an appeal from a judgment of the Supreme Court of Canada, dated November 15, 1906, reversing the judgment of the Superior Court sitting in review at Montreal.

The action was instituted by Armand Prévost and Adèle Prévost, two of the children of Amable Prévost, deceased, to obtain partition of the portion of their father's estate which their brother Louis Roméo Prévost, deceased, took under their father's will of December 24, 1844.

Amable Prévost died in 1872, leaving seven children him surviving. Louis Roméo Prévost died without issue in 1902. The defendants were three of the children of Amable Cyprien Prévost, a son of Amable Prévost, some formal parties, and Valmore Lamarche, the executor of the will of Louis Roméo Prévost.

The point in controversy is whether the share of Amable Prévost's property, taken under his will by his son Louis Roméo Prévost, passed under the latter's will subject to a conditional substitution created by a codicil to his father's will, or whether there is, under the terms of that will, by virtue of the provisions of the Quebec Civil Code, an accretion, in favour of the children and grandchildren of the original testator, of the said share of his son Louis Roméo Prévost.

In order to avoid disputes among the beneficiaries under Amable Prévost's will, a deed of partition, dated April 27, 1883, was executed by them, by which the testator's estate was divided into seven shares. Some question as to the validity of this partition having apparently arisen, an action was instituted for

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partition. It came on for trial before Jetté J., who decided that the partition made by this deed was final and definitive. Thereupon an Act (60 Vict. c. 95) was passed by the Legislature of Quebec (to which more detailed reference will be made hereafter) giving to "any of the parties interested" a right of appeal from the decision of Jetté J. to the Court of Queen's Bench. An appeal was subsequently taken and the judgment of Jetté J. affirmed.

There are thus, really, only two questions for decision: (1.) What, according to the provisions of the Quebec Civil Code, is the true construction of a certain clause in the will of Amable Prévost?

(2.) How far, if at all, is the operation of that clause modified by the provisions of the above-mentioned Act of the Legislature of Quebec?

The clause of the will runs as follows:—

"3° Je donne et lègue à l'enfant né et aux enfants à naître de mon mariage avec Dame Rosalie Victoire Bernard mon épouse actuelle, la jouissance et usufruit leur vie durant de tous les biens meubles et immeubles propres, acquêts, conquêts, argent monnoyé et non monnoyé, dettes actives, droits et actions mobiliers et immobiliers et autres choses généralement quelconques que je délaisserai et qui m'appartiendront aux jour et heure de mon décès, quelques en soient la nature, consistance, qualité, valeur et situation sans aucune réserve ni exception pour mon dit enfant né et les enfants à naître de mon dit mariage, jouir à titre d'usufruit de mes dits biens leur vie durant à toutes les charges ordinaires aux usufruitiers, pour la pleine propriété de mes dits biens appartenir après le décès de mes dits enfants ou d'aucun d'eux aux enfants qui naîtront de leur mariage respectif et pour par mes petits-enfants substitués à mes dits enfants au moyen des présentes, au regard de mes dits biens jouir, user, faire et disposer des susdits biens comme bon leur semblera, les instituant à cet effet mes légataires universels.

"Je veux comme condition expresse et absolue du legs d'usufruit par moi fait à mon dit enfant né et aux enfants à naître de mon dit mariage, de mes susdits enfants 1° que les loyers, rentes, revenus et intérêts de mes dits biens à eux ainsi légués en

usufruit soient touchés et perçus par mes dits enfants respectivement pour leurs aliments et entretien et ceux de leurs enfants et qu'en conséquence les dits loyers, rentes, revenus et intérêts ne soient cessibles ni saisissables par aucuns de leurs créanciers pour quelques causes et raisons que ce puisse être; 2° que mes biens-fonds ou immeubles de quelques nature et qualité qu'ils soient passent en nature à mes dits petits-enfants et qu'en conséquence ils ne puissent être en tout ou en partie vendus ou aliénés par quelque autorité que ce soit ni sous quelque prétexte que ce puisse être, même sous celui du plus grand avantage de mes dits petits-enfants, car telle est mon expresse volonté à cet égard."

Some light is thrown upon the intention of the testator as expressed in this clause by a subsequent clause of the will, which must be considered in connection with the first-mentioned clause. It runs as follows: "Je veux aussi comme condition expresse et absolue du legs par moi fait en propriété à mes dits petits-enfants de mes susdits biens qu'ils, mes dits petits-enfants ou aucun d'eux, ne puissent ou puisse sous aucun prétexte et pour quelque cause que ce soit vendre, aliéner, engager ou hypothéquer leur part ou leur droit ou sa part et ses droits dans mes dits biens avant l'extinction de l'usufruit d'iceux par moi légué à mes dits enfants ou de la part de mes dits biens qui se trouvera appartenir en usufruit au père ou à la mère de mes dits petits-enfants respectivement."

The testator thus, in the opening words of the first-mentioned clause, expressly bequeaths to the children born and to be born of his marriage with his then wife the usufruct and enjoyment of all the property he should die possessed of during their lives; and on the decease of his said children, or any of them, he bequeaths the full proprietary right and interest in the said property to the children to be born of their respective marriages; and he then gives to his grandchildren, thus substituted by his will for his children, as regards his said property, the right to use, enjoy, or dispose of the same as it might seem good to them, instituting them for this purpose his universal legatees. He then attaches two conditions—(1.) that the property so bequeathed to his children in usufruct shall not be assignable, or capable of

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being seized by their creditors; and (2.) that the property bequeathed by him, whether movable or immovable, shall not be sold or alienated under any pretext, but shall pass "*en nature*" to his grandchildren.

From the second of the above-mentioned clauses it is evident that the testator desired to deprive his grandchildren of the right of anticipatory alienation of the property bequeathed by him. He does this, however, by providing that the grandchildren shall not alienate, before the usufruct of those to whom he has bequeathed his property has come to an end, the part or share of the property which should belong in usufruct to their respective fathers or mothers.

If the testator intended that there should be a right of accretion among his children or grandchildren, it would, in order to carry out his intention of preventing premature alienation, have been necessary for him to deprive his grandchildren of the power of alienating by anticipation, not only the shares of their respective fathers or mothers, but the shares which might accrue to them as well. The absence of any provision in this clause dealing with accrued shares suggests strongly that he never meant that there should be any accretion. Their Lordships therefore think that, on the true construction of these two clauses, the intention of the testator's will was that the property bequeathed by him should be, as it were, divided into shares according to the number of his children, one share for *each child*, and that this was the share of which each child was to enjoy the usufruct during his life, and which was to be handed over to that child's children on the former's death.

This appears to their Lordships to be the construction of the testator's will adopted by the Legislature of Quebec and, in effect, declared, in the Act they have passed, to be its proper construction. For the Act not only provides that the division into shares of the property bequeathed, already made by Jetté J., or thereafter to be made by the Court of Appeal, is to be final, but enacts that: "The legatees who are institutes in the substitution established by the said late Amable Prévost are declared to be and always to have been the sole proprietors of the share of the said property which has respectively devolved to them under

the terms of the said deed of partition and liquidation, subject to the condition of handing over such share to their children at their death, as set forth in the said will and codicils; and the children, issue of the marriage of the said Amable Oscar Alexandre Prévost with the said Dame Marie-Louise Duchesnay are declared to be and always to have been, since the death of their father, the sole owners of the property which devolved to the said late Amable Oscar Alexandre Prévost in virtue of the said partition."

This seems inconsistent with the idea of a gift either to the children or grandchildren as a class.

It was urged on behalf of the defendants that this construction of the will is in conflict with the following provision of the codicil, dated December 26, 1844, which Amable Prévost added to his will: "Je veux et entends que si l'enfant né et les enfants à naître de mon mariage avec Dame Rosalie Victoire Bernard, mon épouse, décèdent tous sans laisser d'enfants ni descendants légitimes, avant cette dernière, la dite Rosalie Victoire Bernard, ma dite épouse, ait tant qu'elle gardera viduité de jouissance et usufruit de tous les biens meubles et immeubles, argent monnoyé et non monnoyé, dettes actives et autres choses généralement quelconques que je délaisserai et qui m'appartiendront aux jour et heure de mon décès, de quelques nature et qualité qu'ils soient et en quelques lieux qu'ils se trouvent assis et situés, à l'exception toutefois de la terre avec maisons, bâtiments et dépendances, que je possède à Terrebonne, que je lègue au dit cas à Louis Joseph Prévost, mon frère, en pleine propriété, et pour mes autres biens meubles et immeubles après l'extinction de l'usufruit que j'en ai ci-dessus légué à ma dite épouse tant qu'elle gardera viduité, retourner et appartenir au dit Louis Joseph Prévost et à Dame Eldwidge Prévost, épouse de Sieur Séraphin Bouc et Delle Anathalie Prévost, mes sœurs, s'ils sont vivants, sinon à leurs enfants, pour par eux en jouir, user, faire et disposer en pleine propriété au moyen des présentes, les instituant au dit cas mes légataires universels, qui partageront entre eux ces derniers biens également, sans que le dit Louis Joseph Prévost soit tenu à faire aucun rapport relativement à la dite terre, avec maisons, bâtiments et dépendances que je lui ai au dit cas ci-dessus léguée."

But there is not really any conflict, because if the substitution

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to the several shares never opened, either by reason of the several institutes never having had children at all, or having died without leaving any descendants living at the time of their respective deaths, the several shares would pass to the widow in case she should survive all the children, to be enjoyed by her during her widowhood. It is, however, quite true that, if six of the children of the testator died without children or other descendants, and one of them died leaving a son living at his decease, only one-seventh of the property of the testator would pass to that son instead of the whole. It may possibly be that this is not in accord with the real intention of the testator, but that is a matter of conjecture. If he entertained the intention that there should be accretion amongst his grandchildren, and that in such a case as the above-mentioned the one grandson who survived all his children should take the whole property, he has, in their Lordships' opinion, as well, indeed, as in the opinion of the Legislature of Quebec, failed to use language to express it.

The next matter to consider is the effect of this construction of the will on the devolution or enjoyment of the share of Roméo Prévost. According to art. 944 of the Quebec Code the institute holds the property as proprietor subject to the obligation of delivering it over, without prejudice to the rights of the substitute. According to art. 928 this may be so, though the term "usufruct" be used to express the right of the institute. Art. 957 provides that the substitute who dies before the opening of the substitution in his favour does not transmit any right to his heirs. In the case of Roméo Prévost the substitution never opened, and never can open, unless all his brothers and sisters should die without leaving children or other descendants living at their decease, when, according to one contention, it would open in favour of the widow and the others named in the codicil. He has made a will by which he has bequeathed an annuity to his reputed wife and left the residue of his property to his brothers and sisters and their survivors. In the opinion of their Lordships the share of Louis Roméo Prévost does not pass by substitution either to his brothers and sisters or to his nephews and nieces, but is captured by his will and passes to his executor. They will therefore humbly

advise His Majesty that the appeal ought to be allowed, the judgment of the Supreme Court reversed with costs, and the judgment of the Court of review restored.

The respondents must pay the costs of the appeal.

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Solicitors for appellants: *Lawrence Jones & Co.*

Solicitors for respondents: *Gribble, Oddie, Sinclair & Johnson.*

[PRIVY COUNCIL.]

STRICKLAND AND OTHERS . . . . . DEFENDANTS;

AND

STRICKLAND . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL OF MALTA.

J. C.* 1908 *May* 27, 29; *June* 2, 3; *July* 8.

Law of Malta—Code of Rohan, bk. 4, *c.* 2, *ss.* 3 *and* 4—*Fidei-commissum Primogenitura—Duration of Tenure unto Fourth Gradus—Construction of Gradus—Condition as to Surname not authorized by the Founder—Power to appoint.*

The entailed Maltese property in suit was subjected by will in 1790 to a fidei-commissum unto the fourth degree in terms of the Code of Rohan (bk. 4, c. 2, ss. 3 and 4), which directed that after the fourth degree every tie and burden shall cease, and the property shall pass unburdened to the heir of the fourth and last substitute, the four degrees being counted in capita and not in stirpes without including therein the instituted heir.

The testator's son in 1839, having no children, under a power of appointment contained in the said will, created a primogenitura in favour of his universal heir and grand-nephew "in terms always of the said paternal will and unto the fourth degree contemplated in the said paternal will and allowed by the laws now in force" to endure as long as the fidei-commissum founded by his said father "under the fetters pacts laws and conditions hereinafter stated."

One of these conditions was that in the event which happened of failure of male descent the primogenitura should pass to his only daughter, whose male child when born was to enjoy the primogenitura during his natural life, and after his death it was to pass to his male descent until the exhaustion of the four degrees, with the proviso "that any holder of the said primogenitura descended from a female shall

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* *Present:* LORD MACNAGHTEN, LORD ATKINSON, SIR J. H. DE VILLIERS, and SIR ARTHUR WILSON.

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be bound to add the surname 'Bonici' to his own on penalty of forfeiting the possession of the said primogenitura, which on such contingency occurring shall pass, ipso facto, to the person next called thereto." The said only daughter had sons living at her father's death, including the appellant and respondent, so that the entailed property never came into her possession, but into that of the appellant, her first-born son.

In a suit for a declaration that the appellant, who had been in possession of the property in suit for twenty-two years without taking the name of Bonici, had forfeited his right thereto, and that the same had devolved ipso facto on the respondent, his younger brother, it was pleaded that the condition as to name was not warranted by the will of 1790, and that the appellant, as holder in the fourth degree after that of the instituted legatee, was entitled to keep the property free from any burden :—

Held, that there was no indication in the will of 1790 of a desire on the part of the founder of the fidei-commissum that the beneficiaries should bear his name, and that the power of appointing a primogenitura given thereby did not include an authority to impose that condition on its successive holders.

Held, also, that on the true construction of ss. 2 and 3 of the code the four degrees mentioned therein are degrees of generation and not of actual possession, and therefore include the generation to which the mother of the parties belonged, so that the appellant was the fourth and last substitute. But *quære*, whether under the like construction he holds the property unburdened, or whether it remains burdened until after it has passed to his heirs.

APPEAL from a judgment of the Second Hall of the Civil Court of Malta (June 16, 1905) affirming a judgment of the First Hall (January 31, 1902), whereby it was decided that the appellant Sir Gerald Strickland would forfeit certain immovable properties in Malta which had passed to him under the provisions of a will of Daniele Bonici, his great-great-great-grandfather, dated January 28, 1790, unless he assumed within a period limited by the said judgment the name "Bonici" and bore it continuously thereafter.

Daniele Bonici by his will dated January 28, 1790, subjected his immovable property to a family fidei-commissum unto the fourth degree in terms of the Maltese Code of Rohan of 1784, so that his children might not dispose during the time of the said fidei-commissum of any part of the property except in favour of their children and descendants.

The condition that any holder descended from a female should

be bound to add the surname "Bonici" to his own, on penalty of forfeiting the property, was imposed, not by Daniele Bonici, but by the will, dated March 21, 1839, of Pietro Paolo Bonici, a son of Daniele Bonici, in which he erected a primogenitura in respect of part of his share of his father's property in terms of his father's will to endure as long as the fidei-commissum created thereby.

Primogenituræ and fidei-commissa according to the law of Malta could be established in perpetuity until the publication in 1784 of the Diritto Municipale di Malta, commonly called the Code of Rohan, restricted the duration of majoratus, primogenituræ, and fidei-commissa to the fourth "grado" inclusive.

The effect of the provisions of the Code of Rohan, bk. 4, c. 2, ss. 3 and 4, was that primogenituræ and fidei-commissa should be valid up to the fourth grado inclusive, and that the four gradi (gradus) should be counted in capita and not in stirpes, without including therein the person instituted heir.

The actual meaning of the word grado, whether it was gradus substitutionis or whether it meant a generation, was in dispute in the appeal.

The provisions of the two wills of 1790 and 1839 are sufficiently set out in their Lordships' judgment. The questions decided related to the true construction of the former and to the validity of the conditions imposed by the latter.

On February 6, 1900, the respondent sued for a declaration that the appellant had forfeited the primogenitura created by the will of 1839 on the ground that he had not added the surname Bonici to his own, and that the primogenitura had ipso facto devolved on the respondent.

The appellant alleged—(1.) that the will of Pietro Paolo Bonici so far as concerned the foundation of the primogenitura must be read in connection with the will of Daniele Bonici, on which it is expressed wholly to depend, and which alone conferred the powers in virtue of which the primogenitura was founded by Pietro Paolo Bonici senior; (2.) that the property forming the endowment of the primogenitura had already been bequeathed to Pietro Paolo Bonici senior, subject to the fidei-commissum unto the fourth degree, in terms of the Municipal Law of Malta,

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by Daniele Bonici, and that Pietro Paolo Bonici senior declared that in founding the primogenitura he was only carrying out his father's direction. The appellant therefore submitted—(1.) that the primogenitura could not last beyond the fourth degree mentioned in the will of Daniele Bonici, that is to say, beyond the period of the existence of the fidei-commissum; (2.) that the appellant being the son of Louisa, who was the daughter of Pietro Paolo, who was the son of Giovanni Battista, who was the son of Ugolino, who was the son of Daniele Bonici, was in the fourth degree mentioned in the wills of both Daniele Bonici and Pietro Paolo Bonici, the instituted heirs being excluded from the computation in accordance with the provisions of the Municipal Code; (3.) that therefore, even if the conditions imposed by Pietro Paolo Bonici were valid, the respondent could not claim to benefit by any forfeiture, since the fidei-commissum was declared by Daniele Bonici to exist "up to the fourth degree" only, and not "to the fourth degree inclusive"; (4.) that the holder in the fourth and last degree of a fidei-commissum such as that under Daniele Bonici's will was entitled to hold it free from all burdens and conditions, and even to alienate it; (5.) that the conditions sought to be imposed by Pietro Paolo Bonici exceeded the powers given him by the will of his father, and were therefore ultra vires and void; (6.) that although the condition respecting the addition of a surname was ineffectual in law, the appellant on several occasions had added the name "Bonici" to his own, and that, even if he were held to have broken the condition, he was entitled to be reinstated in accordance with a reintegration clause in the will, and to purge himself of the breach by complying with it.

The respondent replied—(1.) that the fidei-commissum contemplated in the will of Daniele Bonici had never come into existence; (2.) that by the number of degrees is not meant the number of generations, but the number of persons who actually and in succession enjoy the fidei-commissum; (3.) that the appellant was the second holder only, and so in the second and not in the fourth or last degree, and that therefore the respondent, being in the next or third degree, was the only person entitled to take the benefit of the forfeiture which the appellant had incurred;

(4.) that the condition requiring the addition of the name "Bonici" was a matter of paramount significance in the order of succession established by the founder of the primogenitura, and was one of unquestioned validity, and that, since the appellant had not sufficiently or at all complied with or fulfilled the condition, he could not now lawfully purge his breach thereof.

The applicable sections of the Code of Rohan to which reference is made in the will of 1790 are set out in their Lordships' judgment.

The First Hall held that the fidei-commissum was valid and existing; that it did not end with the appellant, for that the degrees mentioned in the wills were not degrees of descent, but of actual succession, and that therefore the appellant was in the second degree only, and not the fourth; that the condition as to assuming the surname of Bonici was good and valid and had been contravened by the appellant. It held, however, that the forfeiture was not ipso facto incurred, but would take place if the appellant did not assume that name within a month of the judgment becoming res judicata and thenceforth bear the name continuously. The Second Hall affirmed this judgment, but substituted a period of three months for that of one month.

The property in suit was included by the appellant in his marriage settlement effected in 1890, and the trustees thereof were represented at the hearing.

Sir R. Finlay, K.C., *J. A. Simon, K.C.*, and *Gwyer*, for the appellant, contended in the first place that the appellant was in the fourth degree of the prohibition against alienation contemplated in the will of Daniele Bonici. In that will, according to Maltese and Roman law, the word "degree" means generation or kindred. It was contended that the meaning of the term "degree" and of the antitheses "in capita" and not "in stirpes" as used in the Municipal Code should be sought in the first place in Maltese legislation, and then in the Maltese common law (i.e., the Roman civil law) and never from foreign sources if the question in dispute can be determined by Maltese or Roman law. Reference was made to Code of Rohan, bk. 4, c. 2, ss. 3 and 4; Voet, bk. 36, tit. 1, s. 31, and s. 7 as to succession in the

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case of fidei-commissa. Sect. 7 refers to Joannes à Someren, and accordingly c. 6 of that work was cited, the summary on p. 93 stating the question whether degree of blood or succession should be understood, and pp. 100-103 answering it in favour of blood. See also Code of Rohan iv. 1. 15 and iv. 2, ss. 2, 3 and 4, where degree is used in the sense of degree of kindred. See also Maltese Ordinance No. 7 of 1868, arts. 490, 503, 504, 515, and 517. The source of this legislation is the 159th novel of Justinian. It was submitted that that novel afforded the clearest proof in favour of the appellant's construction, for it not only lays down the law, but illustrates in detail how Justinian applied it in counting four degrees, shewing that he spoke of degrees and generations as meaning one and the same thing. All the principal authorities on this part of the law of fidei-commissa support this view: Peregrinus, "De fidei commissis," art 30, n. 3, 12, 16 and 17, 20, 22, 23; Torre, "De successione in primogenituris, &c.," part 1, p. 36, n. 116; Huber, Prælect., tom. 1, bk. 2, tit. 23, ss. 15 and 16; Gothofredus, p. 448 on Digest 31, 88, 15, and p. 211, note 54, on Code vi. 42, "De fidei commissis"; De Luca, "De linea legali," bk. 1, art. 30, n. 6, 7; Voet, bk. 36, tit. 1, s. 33, and see also p. 91 of McGregor's translation; Muratori on Defects of Jurisprudence, p. 150; Ciccaglione's "Manuale di storia di diritto Italiano," vol. i., p. 458. See also *Rijklief* v. *Rijklief's Executors* (1); *Du Plessis* v. *Smallberger* (2); *D'Amico* v. *Trigona* (3); *Testaferrata* v. *Testaferrata* (4); *Bruno* v. *Bruno* (5), a Florentine decision in 1767 coram Montordi.

With regard to the question of forfeiture it was contended that the condition as to surname was ultra vires the testator of 1839. It was beyond the scope of the power granted by the will of 1790, and it is only a "last possessor" who is by the Code of Rohan, bk. 4, c. 2, s. 6, allowed to impose new obligations on a fidei-commissum already created, and Pietro Paolo Bonici, the testator of 1839, was not a possessor in the last degree. See, as to the common law on the subject of the exercise of a power of appointment,

(1) (1896) 13 Cape of Good Hope S. C. R. 64.
(2) (1860) 3 Searle, 383.
(3) (1888) 13 App. Cas. 806.
(4) Decisions Maltese Court of Appeal, vol. x., 820.
(5) Ibid., vol. xi., 367.

Voet, bk. 36, t. 1, s. 29, at p. 29 of McGregor's translation; Cujacius, ed. 1758, vol. x., col. 1052; De Nigris, De Nominatione, ed. 1750, vol. i., pp. 207, 215, quest. 47; Digest 36. 1. 63.

Geoffrey Lawrence, for the trustees of the settlement, contended that it was inequitable to adopt a construction of the code which would invalidate a marriage settlement entered into on the faith of a long-established interpretation to the contrary of that now contended for.

Norton, K.C., and *Iselin*, for the respondent, contended that the fidei-commissum established by the will of 1790 and the primogenitura established by the will of 1839 were still subsisting and did not end with the appellant. The law of Malta relating to the duration of fidei-commissa and primogenitura is to be found in the Code of Rohan. Reference was made to bk. 4, c. 2, ss. 3, 4, 6. When the provisions of the code fail, recourse must be had to the common, i.e. Roman, law: see bk. 1, c. 8, s. 37, and c. 9, s. 27. The case really turns on the meaning of the word grado in the Code of Rohan. It was contended that the Court of Appeal was right in holding that grado means the place and order of vocations, that is, degree of substitution. The sections of the code cited contemplate gradi of vocation and not gradi of cognation. The fourth grado accordingly is the fourth substitute or actual possessor, regardless of relationship with the founder. The appellant is not the fourth actual possessor, though he is in the fourth generation; but grado does not mean generation, and the fidei-commissum is not exhausted: four substitutes in actual possession have succeeded, after which the property becomes free. If the gradi are counted in capita and not in stirpes, gradi do not mean generations. The literal meaning, step, is intelligible and does not mean generation. It is so used in Roman law, Inst. 2. 15; Digest 1. 7. 2; 28. 5. 37; 28. 6. 1 (1.); 2. 6. 10. 13; 29. 2. 69; 31. 32. 6; 31. 87. 2; 32, 98; 38. 6. 1. 1. They referred to Torre, "De successione in majoratibus et primogenituris Italiæ," Pars. 1, c. v., 13-22, c. xxv., 24, 266, 268, Pars. 1a, c. 1, 210, 215, Pars. 2, quæstio 16; Peregrinus, "De fidei commissis," art. 30; Huber, Prælect., tom. 1, bk. 2, tit. 23, ss. 15 and 16; Digest 31. 88. 15; Torre, "De primogenituris," vol. i., p. 36, n. 115, c. 4; vol. ii., part 2, quest. 64; *Testaferrata* v.

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Testaferrata (1); *Bruno* v. *Bruno* (2), in which case the fidei-commissum had been founded before the publication of the Code of Rohan, and therefore in the absence of its special provisions; *D'Amico* v. *Trigona*. (3) Justinian's 159th novel is not contrary to this contention, for no mention is made therein of degrees, but of "generations." That law, moreover, was not intended to curtail the duration of fidei-commissa, but to bar an action for the recovery of property subject to fidei-commissum, on the happening of events such as those in the case determined by the novel. Moreover, there is no evidence that the novel was ever accepted in any of the Italian countries. The rule of the Code of Rohan was not intended to reproduce the rule of the novel, but followed the Tuscan law of 1747 on fidei-commissum. The words of the code are almost identical with those of the Tuscan law. The Florentine decision of September 11, 1767, coram Montordi (Thesaurus Ombrosi Decis. 54, vol. ii.), is exactly in point; and shews what the Tuscan law and Code of Rohan meant. It held that the words "degrees of substitution" meant the persons who actually held the property subject to fidei-commissum, so that the fidei-commissum was held to be extinct after the fourth holder or after the fourth passage; and also that in cases where the property had not passed through four hands, the fidei-commissum was not at an end. This construction is more consonant with the probable intention of the legislator, who evidently had in view a fixed limit measured by four lives, and not an uncertain limit measured by four generations, the number of the components of each of which could not be foreseen.

They also contended that the testator of 1839 had power to impose on the holder of the primogenitura the obligation to add the name of Bonici to his own. The appellant has failed to comply with this condition, and, therefore, according to law and the intention of the testator, forfeiture ensued, and the primogenitura ipso facto passed to the respondent. And if the respondent's construction of gradus is not accepted, every one in the fourth generation, including the respondent, can enforce the condition, and the appellant cannot alienate against one in the same generation

(1) Decisions Maltese Court of Appeal, vol. x., 820.

(2) Ibid., vol. xi., 367.

(3) 13 App. Cas. 806.

with himself. As to the exercise of a power of appointment see Voet, bk. 36, tit. 1, s. 29; Digest 36. 1. 63. 10. The condition imposed was reasonable and generally in use with a view to preserving a family name. The power to call the female line of the first stock in preference to the male line of the three successive stocks reasonably carried with it the power of providing for the retention of the family surname. They referred to the work of De Nigris, cited for the appellant, p. 248, para. 7; and contended that the condition as to surname was not ultra vires in this case, where the exercise of the power was optional, but only in those cases where the donee of the power was bound to exercise it.

Sir R. Finlay, K.C., replied.

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The judgment of their Lordships was delivered by

SIR J. H. DE VILLIERS. This is an appeal from a judgment of the Court of Appeal of Malta confirming, with a variation, a judgment of the First Hall of the Civil Court in an action in which the appellant, Sir Gerald Strickland, was the defendant, and the respondent, his brother, Paul Strickland, was the plaintiff. The parties are both sons of Captain Walter Strickland by his wife Louisa Bonici, and she was the daughter of Pietro Bonici junior, who was the son of Giovanni Bonici, and he was the grandson, on his father Ugolino's side, of Daniele Bonici. The questions in dispute between the parties relate to the meaning and legal effect of certain clauses in a will made by Daniele Bonici in the year 1790. At the date of the making of his will Daniele had several children, including two sons, Pietro, and Ugolino, and three daughters, Vincenza, Maria, and Dorotea. After assigning certain immovable property to Pietro, Maria and Dorotea, the will proceeded as follows:—"The said testator . . . . directs and commands that the said immovables . . . . be subject to an entail and fidei-commissum unto the fourth degree in terms of the . . . . new Municipal Code [book 4, chapter 2, ss. 3 and 4], so that each of them may not dispose during the time of the said entail except in favour of his or her legitimate and natural children and descendants, and in default of this or in the absence of their said legitimate and natural children and descendants, in favour of his or her brothers and

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sisters, or of their children, grandchildren and great-grandchildren, so that each of the said Maria Saveria, Pietro Paolo and Dorotea may also dispose of his or her landed property in favour of the aforesaid Ugolino and Vincenza, other brother and sister of theirs, and in favour of their respective legitimate and natural children and descendants; power being, however, granted to the said Maria Saveria, Pietro Paolo, and Dorotea, and to their successors to dispose in favour of the persons aforesaid, by giving and bequeathing more to one and less to the others and, on the contrary, the whole to one and nothing to the others at will; each of the said Maria Saveria, Pietro Paolo, and Dorotea having also the power to create primogenitures in favour of each of his or her brothers and of their legitimate and natural descendants, the testator directing that the said landed property during the time of the entail be always preserved in his family and hence forbidding any alienation or abatement whatsoever."

After the death of Daniele, his son Pietro, who had no children, in the exercise of the power of appointment given to him by his father's will, introduced the following clauses into his own will, which was made in 1839:—"As the said testator also wishes . . . . to avail himself of the full powers granted by the . . . . will of the 28th January 1790 and to create and found on a part of the said paternal immovables another primogenitura in favour of his . . . . universal heir and grand-nephew the Chev. Dr. Pietro Paolo Bonici Mompalao"—to be hereafter termed Pietro junior—"in terms always of the said paternal will and unto the fourth degree contemplated in the said paternal will and allowed by the laws now in force: wherefore the said testator, the Noble Pietro Paolo Bonici"—to be hereafter termed Pietro senior—"in virtue of his present will availing himself of the powers granted to him by his father, has founded and erected, as he does found and erect, a primogenitura to endure as long as the fidei-commissum founded by his said father . . . . under the fetters pacts laws and conditions hereinafter stated."

Among the "fetters, pacts, laws, and conditions" were the following. Pietro junior was to be first stock of the primogenitura, and hold during his natural life only. Upon his death the property was to pass to his male descent from first-born to

first-born until the termination of the four degrees contemplated in the will of Daniele Bonici. In default of the male descent of the first-born the second-born of the stock was to succeed, and so on successively. In case Pietro junior died without male descent, or in case his male descent became extinct, the primogenitura was to go to the daughters in the first degree of Pietro junior, the first stock, to be enjoyed by them conjointly, until the first male child was born to any of them, which male child when born was to enjoy the primogenitura during his natural life, and after his death it was to pass to his male descent from first-born to first-born until the exhaustion of the four degrees, and so on, with the proviso "that any holder of the said primogenitura descended from a female shall be bound to add the surname 'Bonici' to his own on penalty of forfeiting the possession of the said primogenitura, which, on such contingency occurring, shall pass ipso facto to the person next called thereto." Pietro junior had no sons, and he died in 1877, after Pietro senior, leaving an only daughter, Louisa. At the date of her father's death she had sons living, including the plaintiff and the defendant, and consequently the entailed property never came into her possession. The defendant, being her first-born male child, came into possession, and on his marriage to Lady Edeline Sackville he made a settlement in favour of the children who might be born of the marriage. He had been advised that, as he was in the fourth generation after that of the first fiduciary legatee, he acquired the property free from entail, and it was upon this assumption, shared in by his intended wife as well as by himself, that the provisions of his marriage settlement were made. On July 22, 1899, the plaintiff wrote to him as follows:—

"Dear Gerald,

"On consideration I have come to the conclusion that I am bound to claim the Bonici primogenitura on the following grounds:—You have failed to comply with the condition imposed by the will of Pietro Paolo Bonici, founding the Bonici primogenitura, which required that you should bear the surname of Bonici. . . . . Consequently I, as 'prossimo vocato,' am entitled to the said primogenitura.

"I am willing to fulfil the said condition as to bearing the

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surname of Bonici. I should be glad to have your views on the matter."

The defendant then compelled the plaintiff to bring the present action. By his libel the plaintiff, after alleging that the defendant had been in possession of the entailed property for twenty-two years without taking the name of Bonici, sought to have it declared that the defendant had forfeited his right to the primogenitura, and that the primogenitura had, under Pietro senior's "deed of foundation," devolved ipso facto to the plaintiff. The defence raised by the answer in effect was that Pietro senior could not by any deed of foundation impose conditions on the holders of the property not warranted by the will of Daniele Bonici, the original founder of the fidei-commissum; that the defendant, as the holder of the property in the fourth degree after that of the instituted legatee, was entitled to keep the property free from any burden; and that, even if Pietro senior could impose the condition, the defendant had not forfeited his rights, inasmuch as he had, out of regard and deference to the settlor, on several occasions added the surname Bonici to his own. The Court of first instance by its judgment declared that the defendant had not forfeited the primogenitura, but that he would forfeit it unless he made a declaration within one month that he would in future habitually bear the surname. The Court of Appeal affirmed the judgment with this variation, that the time for making the declaration was extended to a further period of three months, and each party was ordered to pay his own costs of appeal. From that judgment the defendant has appealed, and with leave of His Majesty in Council the trustees of the marriage settlement (Earl De La Warr and Philip Witham) have been allowed to appear in the appeal, in order that the interests of the defendant's children might, if necessary, be represented by them on the hearing of the appeal.

Their Lordships entirely concur with the judges of both the Maltese Courts that the defendant has not complied with the direction in Pietro senior's will that every holder of the primogenitura descended from a female should be bound to add the surname Bonici to his own. The only proof offered by the defendant of compliance with the direction was that in some

formal notes for the registration of hypothecs executed after 1882 he used the surname in addition to his own, but, as justly observed by the Court of Appeal, it is not sufficient that a person charged with such an obligation assumes the surname on rare occasions only, but he must do so habitually. The question, however, is, Was it such an obligation as Pietro senior was empowered by the will of the founder of the fidei-commissum to impose? Whatever rights or powers Pietro senior enjoyed in respect of the property in question he derived from the will of Daniele, which is the real "deed of foundation." That will imposed no condition on the beneficiaries to bear the testator's name, and it did not, at all events in express terms, confer on Pietro senior the power of imposing the condition on the successive holders of any primogenitura which he might create. It has not been suggested before their Lordships that, by the law of Malta, the holder of a power of appointment is entitled to exercise it otherwise than in accordance with the directions of the person who created the power, but it has been contended that authority to impose the obligation now in question must be inferred from the general scope of the original will. The will gives the most minute directions on every detail, and if it had been the testator's intention that the benefits of any primogenitura which might be created by his son Pietro should be confined to persons bearing his name, it is not unreasonable to suppose that he would have given some indication of that intention. It is true that power is given to bequeath more to one and less to others, and the whole to one and nothing to others, but that power was not given in case a primogenitura was created. Their Lordships cannot agree that the power actually given necessarily implies the additional power to clog a bequest when made with a condition, or that, if such additional power was given in regard to divisible fidei-commissa, it may be extended by the fiduciary legatee to the primogenitura which he was authorized to create. The learned judge of the first Court held, upon the authority of the decision of the Court of Appeal in the case of *Testaferrata* v. *Testaferrata* (1), that the power to give more to one and less or nothing to others authorized the settlor of the primogenitura to impose on the

(1) Decisions of Maltese Court of Appeal, vol. x., 820.

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party preferred any condition which is not reproved by law, provided such condition is not incompatible with the fidei-commissum ordered by Dr. Daniele, but the judgment as set out in the appendix to the appellant's case does not quite go so far. It was held that the power implied a release from the obligation to allow the property to go to all those called to the succession for equal division between them, and that the power necessarily had reference to a disposal of the property during the existence of the fidei-commissum. The condition which was there actually imposed was not only compatible with the original power given to the donee, but was one which must clearly have been contemplated by the donor. In the present case there exists no indication of any desire on the part of the founder of the fidei-commissum that the beneficiaries should bear his name, and it therefore is unnecessary to inquire whether, in case he had imposed the obligation, it would have been binding upon them.

The learned judge of the first Court quoted the following passage from the Digest (36. 1. 63 (1), s. 10) as shewing that the original testator could himself have validly imposed the obligation: "Si vero nominis ferendi conditio est quam Praetor exigit recte quidem facturus videtur si eam expleverit; nihil enim mali est honesti hominis nomen adsumere." The passage, however, then proceeds thus: "Nec enim in famosis et turpibus nominibus hanc conditionem exigit Praetor. Sed tamen si recusat nomen ferre, remittenda est ei conditio."

From these last words many commentators have concluded that, however noble a name may be, a condition that it shall be borne by the successive holders of a fidei-commissum is not binding upon them, even if imposed in a will whereby a testator disposes of his own property; but it is not necessary to pursue this question any further, for the condition in the present case was not mentioned by the founder of the fidei-commissum, but was imposed by the fiduciary who had special powers of appointment. The validity of a condition thus imposed was fully discussed by De Nigris, a Florentine jurist of repute, in his work "De Nominatione," and he came to the conclusion that the power to impose the obligation did not exist unless the person having

(1) 65 in ed. Mommsen.

the power of appointment had been empowered to impose any conditions that seemed meet to him, and even then he could not impose the penalty of forfeiture. The learned judge remarked on this as follows: "Notwithstanding the opinion of the weighty writer which the Court does not think it can follow, as the condition is lawful and not difficult to fulfil, and as in this case it is a question of assuming the surname of the testator, not only in substitution for but in addition to one's own."

The question, however, is not whether the condition is lawful or easy to fulfil, but whether the person with power of appointment had authority to impose it. The writers quoted before their Lordships are agreed that where a fiduciary is allowed to choose the objects of the testator's bounty he must make his choice in unqualified terms and without imposing any burden or condition not sanctioned by the instrument creating the fidei-commissum. On a fair and reasonable construction of Daniele Bonici's will their Lordships are not prepared to hold that he intended to confer upon his son Pietro senior the power of imposing the obligation now in question on the successive holders, whether of the divisible fidei-commissum or of any primogenitura which the son might create.

If the defendant has not forfeited his rights to the primogenitura, it is difficult for their Lordships to perceive what further interest the plaintiff has in the case. He based his whole claim upon such forfeiture, and it was only in the defendant's answer that the question was raised whether property was released from all burdens upon its coming into his possession as being of the fourth degree. The defendant's sons have died, but he may have more sons, and he has several daughters alive. The Court of Appeal regarded it as a doubtful point, which could not be settled on the appeal, whether the existence of daughters only of the defendant was not an obstacle to the plaintiff's being held to be the person next called to the primogenitura in case the defendant forfeited the same, and it is not necessary for their Lordships to express any opinion on the point. Both the Courts below, however, expressed an opinion that the plaintiff's interest, however remote, was sufficient to allow him to contest the defendant's right to hold the property free from any burden, and

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as this question has been fully argued before their Lordships, they feel bound to express their opinion thereon. It is common cause between the parties that the question whether the defendant now holds the property unincumbered must depend upon the construction to be placed on the provisions of the Code of Rohan (bk. 4, c. 2, ss. 3 and 4). If there had been any doubt upon this point, it would have been removed by the fact that the original testator himself, in limiting the fidei-commissum to the fourth degree, stated that the limitation was to be in terms of the provisions of the code. It appears to be common cause also that, if the degrees mentioned in the code are to be construed as meaning degrees of generation, the defendant would be entitled to hold the property free from "every tie and burden." But for the agreement between all parties on this point, it might have been necessary for their Lordships to inquire more closely whether or not the property only becomes unburdened after it has passed to the heirs of the fourth and last substitute. Notwithstanding the concurrence of the trustees of the marriage settlement with the defendant, their Lordships do not wish to intimate that any decision arrived at in the present case would necessarily be binding upon the defendant's heirs. The present dispute is between him and the plaintiff, and the question to be determined is whether the plaintiff has established any right to prevent the defendant from keeping the property as his own. The provisions of the code, so far as applicable, are as follows:—

Sect. 3. "Majorats, primogenituraе and fidei-commissa shall hold good up to the fourth degree inclusively, after which every tie and burden shall cease, and the property shall pass unburdened to the heir of the fourth and last substitute."

Sect. 4. "The four degrees shall be counted in capita and not in stirpes without including therein the instituted heir."

Sect. 6. "It is not forbidden to found fidei-commissa so that they shall last less than four degrees, likewise the last possessor shall be allowed to renew them for a further period of four degrees or less."

The plaintiff's contention is that the four degrees thus mentioned are degrees of actual possession and not of generation.

If this contention is right, it would follow that the generation of the defendant's mother cannot be counted, inasmuch as she never took possession of the property. It is clear, however, that if Pietro senior had never exercised the power of appointment conferred upon him by his father's will, the defendant's mother would have been entitled to possession of her share of the divisible fidei-commissum, and she would have been regarded as occupying one of the degrees. But Pietro senior expressly stated that the primogenitura founded by him was to endure only as long as the fidei-commissum founded by his father. Even if he had not so directed, the property could not have been tied up for a longer period than that which was authorized by Daniele Bonici in regard to the fidei-commissum. Upon this ground alone the plaintiff's contention appears to their Lordships to fail altogether. But it is further said on his behalf that the term "degree"—"gradi" in the original—cannot mean generations because the fourth article enacts that "the four degrees shall be counted in capita and not in stirpes without including therein the instituted heir." This view was upheld by the learned judges of the Court of Appeal, who remarked that this provision "is intended not to exclude always the right of representation in successions to fidei-commissa, but to establish that the substitute who in relation to the testator is in the same degree of cognation as the preceding possessor, that is, in the same generation, is to constitute a distinct degree of succession, to be reckoned by itself in the duration of the fidei-commissum, for the ends of the law."

Their Lordships regret that they cannot follow this reasoning. If the fourth article has any bearing upon the particular question in dispute, it would rather support the defendant's contention that he did not take the primogenitura as representing his mother, and that consequently her generation ought to be counted as well as his own. There is no reason to believe that the expressions in capita and in stirpes are used in a different sense in the law of Malta from that in which they were used by the civilians; and, indeed, in the later legislation of the island it was made clear that the terms were used in exactly the same sense. The 490th article of Ordinance No. 7 of 1868 enacts and declares that "Proximity of relationship is determined by the number of

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generations. Each generation forms a degree. A series of degrees forms a line." Art. 503.—"If the children or descendants of brothers or sisters are found to be in an equal degree they all succeed per capita without representation." Art. 504.—"In all cases in which representation is admitted the partition is made per stirpes." Before the enactment of the Code of Rohan it had been a moot point with the commentators on the Digest whether representation was admissible in the computation of degrees where a fidei-commissum had to be restored to a family. The majority, according to Gothofredus, were in favour of the principle of representation, but even where this principle was adopted it was not allowed to lengthen the existence of fidei-commissa according to the doctrine that fidei-commissa are stricti juris and odious. The following passage from Voet (36. 1. 7, McGregor's translation) makes the point perfectly clear:—"If the testator had provided, that there should be no alienation of the property so long as blood relations of the second degree were in being, and if the inalienable property were to go to the brothers and to the son of another predeceased brother, by virtue of the principle of representation, it is doubtful whether only the brothers of the second degree of relationship or the brother's son also, though of the third degree, should be held burdened with the fidei-commissum. At the first blush we might consider the son equally bound, because in the same way as he is understood to be placed not in the third but in the second degree in the succession by virtue of the principle of representation and takes rank in the second degree . . . . so also he shares with those of the second degree in the burdens attaching to that which is acquired by virtue of representation, the more since it is equitable that the burdens of a thing should fall on him who enjoys the advantages thereof. But the Supreme Court of Utrecht has held otherwise in a judgment which was upheld on appeal, because, as Johannes van Someren elegantly and forcibly puts it, representation operates to one's advantage and not to one's disadvantage. The son, indeed, attains to the inheritance by virtue of the fidei-commissum, but he stands in a degree of relationship wherein the restraint on alienation has ceased to be operative. It is by operation of

law and not by virtue of the will that he occupies a place in the second degree, but the restraint on alienation is derived from the will and not from the law. A fidei-commissum is stricti juris and odious in so far as it affects the burdened party, nor shall its existence be lightly presumed."

The effect of the fourth article of the Code of Rohan is to remove all doubt upon the point thus discussed by the commentators. The degrees are not to be counted in stirpes, there is to be no representation, and, consequently, there can be no question of a person of a later generation stepping into a degree occupied by any of the previous generations. The further provision of the article that the instituted heir was not to be included among the four degrees was obviously introduced with the object of settling another question upon which there had been some diversity of opinion. The 159th novel of Justinian, which established the rule against perpetuities, fixed the fourth degree as the limit, but in those four degrees it seems to have included the instituted heir. The Code of Rohan makes it clear that by the law of Malta he is to be excluded in counting the number of generations. The novel itself is so verbose, and the reasoning upon which it is founded is so loose, that it is not surprising that the commentators thereon arrived at conflicting conclusions as to its true meaning and import. It contained a decision upon an actual case submitted to the Emperor, and a direction that the rule thus established should extend to all future similar cases, but it is difficult to extract the exact rule intended to be established. The testator had directed that certain suburban property of his should always and for ever remain in his family, and never go out of the possession of those who bore his name, but the Emperor held that, inasmuch as four generations had passed (quod quattuor jam generationes praeteriisse viderentur) when the holder alienated the property, such alienation was permissible. Among the questions upon which the commentators differed was, strangely enough, one whether a testator might not, by the use of appropriate words, bind property in perpetuity, and in many countries, including the Netherlands, according to the testimony of Sande (Decis. Fris. 4. 5. 4.), Huber (Hed. Rechtsgel. 11. 19. 64), Voet (36. 1. 33), and others, a perpetual fidei-

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commissum could be extended beyond the fourth degree where the testator's intention to that effect had been emphatically expressed. But whatever divergence of opinion there was upon other points, the commentators whose works have been cited before their Lordships appear to be unanimous that the limit of time fixed by the novel was to be counted by generations. Owing probably to the influence of feudalism, the rule laid down in the novel appears not to have been incorporated in the common law of Malta, although that law was admittedly based on the Roman law. It was clearly with the view of bringing the law of Malta into line with the laws of other countries which had adopted the rule, that the articles in question of the Code of Rohan were enacted. They introduced such modifications as the circumstances of the country required, but they contained no indication whatever that the four degrees were not to be counted by generations. The word "gradi" is used, and the utmost that can be said is that in the Digest a few passages are to be found in which the term "gradus"—the Latin equivalent for "grado"—might be held to signify something different from a degree of generation. No passage, however, has been quoted in which the term as applied to the rules against perpetuities has ever been used in any other sense than that of generations. A case has, however, been quoted from the Florentine Decisions (No. 54), in which it is said to have been held that, under certain articles of the Imperial law promulgated in Tuscany in 1747, which correspond with the articles now in question, "degrees" mean the persons who actually held the property subject to the fidei-commissum. The decision is that of Canon Montordi, who had been charged by the Supreme Magistracy to give his opinion on a certain claim. The claim was that, as the claimant was the fourth and last possessor under a fidei-commissum, he should be declared to hold the property free from any tie, notwithstanding the provision of the Imperial law, which did not put an end to the burden until after four degrees, when the property was to go to the heir of the fourth and last substitute. Montordi's decision was in favour of the claimant, and their Lordships would remark in passing that it is a clear authority in favour of the view that, if Sir Gerald Strickland is in the fourth degree, he holds the

property unburdened notwithstanding the concluding words of the third article of the Code of Rohan. The sole point to which Montordi directed his attention was whether the analogous provision of the Imperial law stood in the way of the claimant. He freely quoted Voet, Peregrinus, and other writers, and he came to the conclusion that the object of the Imperial law was "to favour the freedom of property, and therefore the doubt whether the fourth substitute has unfettered power to alienate should be decided in his favour."

He seemed to assume that the claimant was in the fourth degree, but the claimant could only have been in the fourth degree if both his paternal uncles, who, of course, belonged to one and the same generation, were counted as constituting two degrees. If Montordi did direct his attention to this point, which the report does not shew that he did, the inclusion of both the brothers among the degrees to be counted could only have been based upon the doctrine to which he refers, that the construction ought to be in favour of the "freedom of property." It by no means follows that in a case like the present he would have adopted a construction which would greatly prolong the period of restraint on alienation, and thus hamper the "freedom of property." The learned judge of the Court of first instance in the present case remarked that this construction appeared to him "to be more consonant with the probable intention of the legislator, who evidently intended to restrict the duration of the fetter, and in establishing a duration of four degrees had probably in view a fixed limit, namely the duration of four lives, and not an uncertain limit, such as the time for the extinction of four generations, the number of the components of which cannot be foreseen."

It would, however, appear to their Lordships that the duration of the fetter has not been restricted by a construction which excludes from the four degrees former generations merely because none of those generations has actually come into possession of the property. As to the uncertainty of the duration, there must necessarily be uncertainty where no definite period has been fixed, but the construction adopted by the Courts below appears greatly to increase the uncertainty by making the

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duration depend upon the further contingency of individuals of some generations not surviving the fidei-commissary possessors of previous generations.

The learned judge of the first Court admitted that until then it had been "commonly held that the degrees contemplated in the code were those which represented the distance between relations, that is, the generations," and he did not, in the opinion of their Lordships, advance sufficient reasons for departing from the view thus commonly held. In none of the cases cited before their Lordships was this question definitely raised, but, so far as they go, these cases support that view. In the case, for instance, of *D'Amico* v. *Trigona* (1), which came in appeal before their Lordships from the Court of Appeal of Malta, it appeared that the Court of Appeal, in the construction of the will there in question creating a primogenitura, had referred to degree and generation as interchangeable terms. Lord Selborne, in delivering the judgment of their Lordships, said (at p. 827), "But the Court of Appeal held that any such majorat or primogenitura, created by the will of Fabrizio, could not endure, so as to give preference to male collaterals over female descendants of the last holder of the barony, beyond the fourth degree or generation, reckoned downwards from Fabrizio himself"; and there is nothing in their Lordships' judgment to shew that they considered the term "degree" as applied to primogenitura to have any other meaning than degree of generation.

Their Lordships have not deemed it necessary to review in detail the numerous authorities which, through the industry of counsel on both sides, have been placed before them, and it is sufficient for them to add to what they have already said that the great weight of authority, especially of such jurists as Torre, Peregrinus, and Mantica, entirely supports the defence raised by the defendant's answer. Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed and judgment entered for the defendant, with costs in both the Courts of Malta. The plaintiff, who is respondent in this

(1) 13 App. Cas. 806.

appeal, will bear the costs of such appeal, except the costs of the trustees, as to which there will be no order.

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Solicitors for appellants, including the trustees: *Witham, Roskell, Munster & Weld.*

Solicitors for respondent: *Lee & Pembertons.*

[PRIVY COUNCIL.]

MARY WATTS AND THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA (INTERVENANT) . . . . . } APPELLANTS;

AND

RUBIN WATTS . . . . . RESPONDENT.

J. C.*
1908
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ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Law of British Columbia—Divorce Jurisdiction of the Supreme Court.

The Supreme Court of British Columbia has jurisdiction to entertain a petition for divorce between persons domiciled in that Colony and in respect of matrimonial offences alleged to have been committed therein.

APPEAL from a decree of the Supreme Court of British Columbia (November 11, 1907) dismissing the petition of Mary Watts, the appellant, for divorce and the counter-claim of the respondent for nullity of marriage on the ground of want of jurisdiction. It was filed on March 21, 1907, alleging adultery and cruelty by the respondent, who filed his answer on May 11 then next.

Clement J., after hearing evidence, but without discussing or hearing argument on the merits, directed that argument should be made before him as to the power and jurisdiction of the said Supreme Court to grant a divorce and as to the power of one judge to hear a divorce cause, and that notice should be given to

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

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the Solicitor-General for Canada and the appellant the Attorney-General for British Columbia. In his judgment (see 13 B. C. 281) he held that the Court had no jurisdiction to grant any decree of divorce. He dissented from the decision in *S.* v. *S.*, (1877) B. C. vol. i., pt. 1, 25. Martin J., however, subsequently dissented from the judgment of Clement J., and granted a divorce in British Columbia in the case of *Sheppard* v. *Sheppard*, judgment in which was delivered on April 1, 1908.

In the judgment appealed from Clement J., after pointing out that there was admittedly no legislation on the subject emanating from a British Columbia Legislature before 1871, when British Columbia became a Canadian province, and none since that date, for divorce was a subject assigned exclusively to the Dominion Parliament, said that the contention was that the law of England, civil and criminal, as it existed in November, 1858, had been introduced, including its law of divorce, into the Colony by proclamation of that date. Upon this issue he held that, "so far as the Act of 1857 was limited to the creation of a Court, it was a purely local law clearly inapplicable to British Columbia. But substantive law is sometimes (e.g., in the Judicature Acts) found among the clauses of a statute, the main purpose of which is to create a Court, and to some extent that is the case in the Act of 1857 now under examination. Having created an exceptionally strong Court to take over the jurisdiction theretofore exercised by the Ecclesiastical Courts, it was deemed expedient to withdraw divorce legislation from Parliament, practically, though of course not legally, and to elevate a moral right to legislative favour into a legal right enforceable in a Court of justice. But not in any of the ordinary Courts, only in this exceptionally strong Court, and in it only when constituted in an exceptionally strong way of three judges, of whom the judge of the newly created Court of Probate was to be one. The Act did undoubtedly, I think, create a new right as betweeen husband and wife in England, but, in my opinion, only sub modo. That new right was so inseparably incidental to and bound up with the jurisdiction of an essentially local Court that I cannot bring myself to view it as other than itself essentially local. It is impossible, in my opinion, to segregate the bare right to a judicial decree from the

local conditions as to its enforcement. These local conditions did not, and could not, exist in British Columbia. Sir William Grant's description of the Mortmain Act—*Attorney-General* v. *Stewart* (1)—might well, it appears to me, be taken as a pen picture, accurate in every detail, of the Divorce and Matrimonial Causes Act of 1857: 'In its causes, its objects, its provisions, its qualifications, and its exceptions it is a law wholly English, calculated for purposes of local policy, complicated with local establishments, and incapable, without great incongruity, of being transferred as it stands into the code of any other country.' *Attorney-General* v. *Stewart* (1) was approved of and followed in the House of Lords: *Whicker* v. *Hume*. (2)

"In short, I am of the opinion that the law enacted by the Divorce and Matrimonial Causes Act of 1857 was, from local circumstances, wholly incapable of application to British Columbia; and I cannot bring myself to hold that the establishment, by colonial enactment, couched in general terms, of what I may call an ordinary Court, with general jurisdiction throughout the Colony, was intended, or would suffice, to make it an extraordinary Court with the extraordinary, almost revolutionary, jurisdiction of the lately created English Divorce Court."

Sir R. Finlay, K.C. (*J. A. Simon, K.C.*, with him), for the appellant, contended that Clement J. had jurisdiction to grant a decree of divorce; that the English law of divorce as contained in the Acts of 1857 and 1858 was in force in British Columbia and had been uniformly applied in that Colony both before and since the decision of Clement J. They referred to Sir James Douglas's Proclamations of November 19, 1858, and June 8, 1859, to 29 & 30 Vict. c. 67, s. 3, the English Law Ordinance, 1867, (R. S. B. C., c. 115), and the order of May 16, 1871: see Safford and Wheeler. There is no provincial or Dominion statute dealing with the divorce jurisdiction of the Court in question. They also referred to *Sharpe* v. *Sharpe* (3); *Scott* v. *Scott* (4), as to the

(1) (1817) 2 Mer. 143, at p. 160.
(2) (1858) 7 H. L. C. 124; 28 L. J. (Ch.) 396.
(3) (1877) 1 B. C. Rep. 25.
(4) (1891) 4 B. C. Rep. 316, 318.

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jurisdiction of a single judge; *Sheppard* v. *Sheppard* (1), the judgment of Martin J., dated April 1, 1908.

The respondent did not appear.

The judgment of their Lordships was delivered by

LORD COLLINS. The only question raised in the present appeal is whether the Supreme Court of British Columbia has jurisdiction to entertain a petition for divorce between persons domiciled in that Colony, and in respect of the matrimonial offences alleged to have been committed therein.

The Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), came into force in England on January 11, 1858, and the amending Act (21 & 22 Vict. c. 108) came into force on August 2, 1858.

On November 19, 1858, Sir James Douglas, the Governor of the Colony, published a Proclamation, intituled "A Proclamation having the force of law to declare that English law is in force in British Columbia," whereby it was enacted and proclaimed that "The civil and criminal laws of England, as the same existed at the date of the said Proclamation, and so far as they are not from local circumstances inapplicable to the Colony of British Columbia, are and will remain in full force within the said Colony till such time as they shall be altered by Her Majesty in Her Privy Council, or by me the said Governor, or by such other legislative authority as may hereafter be legally constituted in the said Colony."

At the date of the said Proclamation the law of England relating to divorce was as provided in the Acts above mentioned.

By a Proclamation having the force of law, of June 8, 1859, the Supreme Court of British Columbia was constituted. The said Court was to have complete cognizance of all pleas whatsoever and to have jurisdiction in all cases, civil as well as criminal, arising within the Colony of British Columbia.

By s. 3 of the British Columbia Act, 1866 (29 & 30 Vict. c. 67), the Colony of Vancouver Island and the Colony of British Columbia were united into one Colony under the name of British Columbia.

(1) Unreported at present.

By the English Law Ordinance, 1867, the said Proclamation of November 19, 1858, was repealed, and in lieu thereof it was enacted: "From and after the passing of this Ordinance the civil and criminal laws of England as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the Colony of British Columbia."

Then followed a provision safeguarding any modifications made by past legislation in either Colony.

By an Order in Council of May 16, 1871, the said Colony of British Columbia was admitted into and became part of the Dominion of Canada. By s. 2 of the English Law Act (Revised Statutes of British Columbia, c. 115) it was further enacted that "The Civil laws of England as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, shall be in force in all parts of British Columbia: Provided, however, that the said laws shall be held to be modified and altered by all legislation still having the force of law of the Province of British Columbia or of any former Colony comprised within the geographical limits thereof."

No statute concerning the power or jurisdiction of the said Supreme Court of British Columbia dealing with the subject of dissolution of marriage was passed by the Legislature of Vancouver or of British Columbia prior to the said May 16, 1871; nor has any statute concerning such power or jurisdiction been enacted by the Federal Parliament of the Dominion of Canada since that date.

The appellant Mary Watts was married to the respondent on October 12, 1904, at the city of Walla Walla, in the State of Washington, one of the United States of America. After the marriage she lived and cohabited with the respondent in the city of Vancouver, in the Province of British Columbia, and they have been, and at the date of the filing of the petition next hereafter mentioned were, domiciled in the said city.

On March 21, 1907, the appellant filed in the Supreme Court of British Columbia a petition for a dissolution of her marriage with the respondent and for alimony. The respondent filed an answer to the petition and counter-claimed for a declaration that his

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alleged marriage with the appellant was null and void. The cause came on for hearing on July 24 and 25, 1907, when Clement J., having heard the evidence of the parties and their witnesses, without discussing the merits, directed that argument should be made before him as to the power and jurisdiction of the Supreme Court to grant a divorce, and as to the power of one judge to hear a divorce cause, and that the Solicitor-General for Canada and the Attorney-General for British Columbia should be served by the appellant with notice, and that the said cause should come on for further argument on October 1, 1907. Accordingly, on that day, counsel for the appellant and the respondent and the Attorney-General for British Columbia appeared, but no counsel appeared for the Solicitor-General for Canada. It was contended by all parties that the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), had, by virtue of the Proclamations and Acts above stated, operative effect in British Columbia, and that the Supreme Court of British Columbia had jurisdiction to grant divorces, and that such jurisdiction could be exercised by a single judge. On November 11, 1907, the learned judge delivered judgment, making no finding on the merits, but holding that the Supreme Court had no power or jurisdiction to grant any decree of divorce, and he ordered that the petition and counter-claim should be dismissed, and that the appellant and respondent should each pay their own costs. In arriving at this decision he refused to follow a decision of the Full Court, in which it was held by two judges, the Chief Justice dissenting, that the jurisdiction exists and could be exercised by a single judge.

On February 29, 1908, by Order in Council of that date, leave to appeal was given to the petitioner, Mary Watts, and to the Attorney-General for the Province of British Columbia leave to join in the appeal as co-appellant, and it was further ordered that the Attorney-General for the Dominion of Canada should be allowed to intervene in the said appeal.

Since the decision in *S.* v. *S.* (1) jurisdiction in divorce cases has been uniformly exercised by single judges of the Supreme Court in British Columbia, and in *Scott* v. *Scott* (2) the question was again debated before the Full Court of three judges, including

(1) (1877) B. C. vol. i., pt. 1, p.25. (2) 4 B. C. Rep. 316.

the Chief Justice, who had dissented in the former case. In delivering the judgment Begbie C.J. says: "We have neither the power nor the inclination to discuss the decision in *S.* v. *S.* or to impugn it in any way."

Since the decision of the present case by Clement J., Martin J., in the case of *Sheppard* v. *Sheppard*, decided April 1, 1908, has refused to follow it, and has given his reasons at length in a very able and elaborate judgment, tracing the evolution of divorce jurisdiction in the Colony back to its first beginnings and removing some apparent misapprehensions on the part of Clement J. as to the attitude of Begbie C.J. towards this jurisdiction after the decision in *S.* v. *S.*

In the opinion of their Lordships, the reasons given in the judgments of Gray and Crease JJ. in *S.* v. *S.*, together with the recent critical survey of the ultimate situation by Martin J. in *Sheppard* v. *Sheppard*, place the question beyond discussion, and it seems to their Lordships, with all deference to Clement J., that his opinion to the contrary cannot be supported.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, the judgment appealed from set aside, and the case remitted to the Supreme Court to be decided on the merits.

There will be no order as to the costs of the appeal.

Solicitors for appellant: *Gard, Rook & Co.*

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The drawer of a cheque induced by the fraud of W. drew the cheque to the order of K., an existing person, and intended him to be the payee. W. forged K.'s indorsement, and paid the cheque into his own account at his bankers', who received the amount of the cheque from the drawer's bank:—

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—— *Cavalier* v. *Pope* - [1906] A. C. 428
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—— *Cooper* v. *Cooper* (1874) L. R. 7 H. L. 53
Followed by P. C. BLAKE *v.* BAYNE
[**1908**] **A. C. 371**

—— *Cushing* v. *Dupuy* (1880) 5 App. Cas. 409
Distinguished by P. C. *In re* WI MATUA'S WILL - [**1908**] **A. C. 448**

—— *Davies* v. *Seisdon Union*, [1907] 1 K. B. 630
Affirmed by H. L. (E.)
[**1908**] **A. C. 315**

—— *Dick* v. *Audsley* - (1907) S. C. 953
Affirmed by H. L. (Sc.)
[**1908**] **A. C. 347**

—— *Dillet, In re* - (1887) 12 App. Cas. 459
Followed by P. C. TSHINGUMUZI *v.* ATTORNEY-GENERAL OF NATAL
[**1908**] **A. C. 248**

—— *General Accident, Fire, and Life Assurance Corporation, Ld.* v. *McGowan*, (1907) S. C. 1004.
Affirmed by H. L. (Sc.)
[**1908**] **A. C. 207**

—— *Glukman, In re; Attorney-General* v. *Jefferys*, [1908] 1 Ch. 552.
Affirmed by H. L. (E.) *sub nom.* ATTORNEY-GENERAL *v.* JEFFERYS
[**1908**] **A. C. 411**

CASES—*continued.*

—— *Greenshields, Cowie & Co.* v. *Stephens & Sons, Ld.*, [1908] 1 K. B. 51.
Affirmed by H. L. (E.)
[1908] **A. C. 431**

—— *Guildhall, The* - - - [1908] P. 29
Reversed by H. L. (E.) *sub nom.* OWNERS OF SS. GUILDHALL *v.* GENERAL STEAM NAVIGATION COMPANY. THE GUILDHALL
[1908] **A. C. 159**

—— *Hall* v. *Hubner* - - (1897) 24 R. 875
Dissented from by H. L. (Sc.) CAMERON v. YOUNG [1908] **A. C. 176**

—— *Hill* v. *Clifford. Clifford* v. *Timms. Clifford* v. *Phillips*, [1907] 2 Ch. 236.
Affirmed by H. L. (E.) CLIFFORD *v.* TIMMS, [1908] **A. C. 12.** CLIFFORD *v.* PHILLIPS - - - [1908] **A. C. 15**

—— *Hirst & Capes, In re* - [1908] 1 K. B. 982
Affirmed with a slight variation by H. L. (E.) *sub nom.* HIRST & CAPES *v.* FOX - - - [1908] **A. C. 416**

—— *Hopper No. 66, The*, [1906] P. 34; C. A. [1907] P. 254.
Reversed by H. L. (E.) *sub nom.* SIR JOHN JACKSON, LD. *v.* OWNERS OF STEAMSHIP BLANCHE. THE HOPPER NO. 66 - - - [1908] **A. C. 126**

—— *Imperial Fire Insurance Co.* v. *Wilson*, (1876) 35 L. T. 271.
Affirmed by H. L. (Sc.) GENERAL ACCIDENT, FIRE, AND LIFE ASSURANCE CORPORATION, LD. *v.* MCGOWAN
[1908] **A. C. 207**

—— *J. C.* v. *Society of Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow*, (1904) 7 F. 345.
Reversed by H. L. (Sc.)
[1908] **A. C. 183**

—— *James Nelson & Sons, Ld.* v. *Nelson Line (Liverpool), Ld.* (*No.* 2), [1907] 1 K. B. 769.
Affirmed by H. L. (E.) *sub nom.* NELSON LINE (LIVERPOOL), LD. *v.* JAMES NELSON & SONS, LD. [1908] **A. C. 16**

—— *Kydd* v. *Liverpool Watch Committee*, [1907] 2 K. B. 591.
Reversed by H. L. (E.)
[1908] **A. C. 327**

—— *Macbeth* v. *North and South Wales Bank*, [1908] 1 K. B. 13.
Affirmed by H. L. (E.) *sub nom.* NORTH AND SOUTH WALES BANK, LD. *v.* MACBETH. NORTH AND SOUTH WALES BANK, LD. *v.* IRVINE
[1908] **A. C. 137**

—— *Manchester Corporation* v. *New Moss Colliery, Ld.*, [1906] 2 Ch. 664.
Affirmed by H. L. (E.) *sub nom.* NEW MOSS COLLIERY, LD. *v.* MANCHESTER CORPORATION - - [1908] **A. C. 117**

CASES—*continued.*

—— *Maple & Co. (Paris), Ld.* v. *Inland Revenue Commissioners*, [1906] 2 K. B. 834.
Reversed by H. L. (E.) *sub nom.* INLAND REVENUE COMMISSIONERS *v.* MAPLE & CO. (PARIS), LD.
[1908] **A. C. 22**

—— *Montgomerie & Co.* v. *Haddington (Provost and Magistrates of)*, (1908), S. C. 127.
Affirmed by H. L. (Sc.)
[1908] **A. C. 170**

—— *Nelson & Sons, Ld.* v. *Nelson Line (Liverpool), Ld.*, [1907] 2 K. B. 705.
Reversed by H. L. (E.) *sub nom.* JAMES NELSON & SONS, LD. *v.* NELSON LINE (LIVERPOOL), LD. - [1908] **A. C. 108**

—— *Nelson Line (Liverpool), Ld.* v. *James Nelson & Sons, Ld.*, [1908] A. C. 16.
See JAMES NELSON & SONS, LD. *v.* NELSON LINE (LIVERPOOL), LD., H. L. (E.) - - - - [1908] **A. C. 108**

—— *Reg.* v. *Tipton* - - (1842), 3 Q. B. 215
Overruled on one point by H. L. (E.). WEST HAM UNION *v.* EDMONTON UNION
[1908] **A. C. 1**

—— *Reney* v. *Magistrates of Kirkcudbright*, [1892] A. C. 264.
Followed by P. C. EAST LONDON HARBOUR BOARD *v.* CALEDONIA LANDING, SHIPPING, AND SALVAGE COMPANY - - - [1908] **A. C. 271**

—— *Rex* v. *Marylebone County Court Judge and Great Western Ry. Co., Ex parte Phillips & Co.*, [1906] 2 K. B. 426; C. A. [1907] 2 K. B. 664.
Reversed by H. L. (E.)
[1908] **A. C. 101**

—— *Scottish Union and National Insurance Co.* v. *Inland Revenue*, (1889) 16 R. 461.
Affirmed by H. L. (Sc.). GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LD. *v.* MCGOWAN
[1908] **A. C. 207**

—— *Spencer* v. *Registrar of Titles*, [1906] A. C. 503.
See SPENCER *v.* REGISTRAR OF TITLES **P. C.** [1908] **A. C. 235**

—— *Speyer Brothers* v. *Inland Revenue Commissioners*, [1907] 1 K. B. 246.
Affirmed by H. L. (E.) [1908] **A. C. 92**

—— *Théberge* v. *Laudry*, (1876) 2 App. Cas. 102.
Distinguished by P. C. *In re* WI MATUA'S WILL - [1908] **A. C. 448**

—— *Thomson's Estate, In re*, [1907] 1 I. R. 311.
Reversed by H. L. (I.) *sub nom.* EVELYN VISCOUNTESS DE VESCI *v.* O'CONNELL - - [1908] **A. C. 298**

—— *Tillmanns & Co.* v. *Steamship "Knutsford," Ld.*, [1908] 2 K. B. 385.
Affirmed by H. L. (E.) *sub nom.* STEAMSHIP "KNUTSFORD," LD. *v.* TILLMANNS & CO. - [1908] **A. C. 496**

CASES—*continued.*

—— *Toal* v. *North British Ry. Co.*, (1908) S. C. 48.
Reversed by H. L. (Sc.)
[1908] A. C. 352

—— *Train* v. *Clapperton* - (1907) S. C. 517.
Affirmed by H. L. (Sc.)
[1908] A. C. 342

—— *Tunnicliffe & Hampson, Ld.* v. *West Leigh Colliery Co.*, [1906] 2 Ch. 22.
Reversed by H. L. (E.) *sub nom.* WEST LEIGH COLLIERY COMPANY *v.* TUNNICLIFFE & HAMPSON, LD.
[1908] A. C. 27

—— *Wakefield and District Light Ry. Co.* v. *Wakefield Corporation*, [1907] 2 K. B. 256.
Affirmed by C. A. *sub nom.* WAKEFIELD CORPORATION *v.* WAKEFIELD AND DISTRICT LIGHT RAILWAY COMPANY - - - [1908] A. C. 293

—— *Wednesbury Corporation* v. *Lodge Holes Colliery Co.*, [1907] 1 K. B. 78.
Reversed by H. L. (E.) *sub nom.* LODGE HOLES COLLIERY COMPANY *v.* WEDNESBURY CORPORATION [1908] A. C. 323

—— *Weir* v. *Crum-Brown*, (1907) S. C. 185.
Affirmed by H. L. (Sc.)
[1908] A. C. 162

—— *Westminster Corporation* v. *Gordon Hotels, Ld.*, [1907] 1 K. B. 910.
Affirmed by H. L. (E.)
[1908] A. C. 142

—— *Whitehouse* v. *R. & W. Pickett*, (1908) S. C. 218.
Affirmed by H. L. (Sc.)
[1908] A. C. 357

—— *Wood Green Urban Council* v. *Joseph*, [1907] 1 K. B. 182.
Affirmed on another ground by H. L. (E.) - - - - [1908] A. C. 419

CHARITY —*Gift for Relief of indigent Bachelors and Widowers—Uncertainty.*

A testator by his trust disposition and settlement directed his trustees to "employ the whole residue of my estate in instituting and carrying on a scheme for the relief of indigent bachelors and widowers of whatever religious denomination or belief they may be who have shown practical sympathy either as amateurs or professionals in the pursuit of science in any of its branches, whose lives have been characterized by sobriety, morality and industry, and who are not less than fifty-five years of age, or of aiding any scheme which now exists or may be instituted by others for that purpose." The next of kin contended that the bequest was void for uncertainty:—

Held (affirming the decision of the Second Division of the Court of Session, (1907) S. C. 185), that the bequest was not void for uncertainty, for the trustees, or failing them the Court, would find no difficulty in giving effect to it. WEIR *v.* CRUM-BROWN - - - H. L. (Sc.) 162

CHARITY—*continued.*

2. —— *Trust—Uncertainty—Residue — Will —Construction.*

A testator, by the last purpose of his trust disposition and settlement, after bequeathing a number of legacies to specific charities and public institutions, gave his trustees full power "at any time or times" . . . . "as and when the said residue or any part thereof becomes available, as they may deem proper, to pay over or divide the said residue or any part or parts thereof to or amongst such local or Scottish charitable institutions and schemes already constituted, or which may hereafter be constituted (and which may include those hereinbefore named), as they may select, or any one or more of such institutions and schemes, and that at such time, in such manner, or in such proportions, all as they in their absolute discretion may deem proper." The trustees were also to have the "fullest powers of and in regard to realisation, investment, administration, management, and division as if they were beneficial owners." They were further empowered to retain the investments of which the estate might consist at the time of the testator's death, "and that for such time or times as they may think fit or indefinitely":—

Held (affirming the decision of the First Division of the Court of Session, (1907) S. C. 953), that the bequest of the residue was not void for uncertainty. DICK *v.* AUDSLEY
H. L. (Sc.) 347

CHARTER—Mahomedan law—Administration of wakf estate—Rights of wakifs—Charter of incorporation superseded - - 526
See PRIVY COUNCIL APPEALS. 27.

CHARTERPARTY—Exceptions — Demurrage — Construction—"Ejusdem generis" 295
See SHIPPING. 3.

—— Ship—Lay days—Exception of Sundays and holidays - - - - 108
See SHIPPING. 4.

—— Ship—Limitation of liability—"Owners" —Charterer by demise - - - 126
See SHIPPING. 5.

CHEQUE—Forged indorsement—Payee—"Fictitious or non-existing person"—Bills of exchange - - - - - 137
See BANKER.

CHINA AND COREA—Laws of.
See PRIVY COUNCIL APPEALS. 23, 24.

—— Order in Council, 1904, s. 100.
See PRIVY COUNCIL APPEALS. 24.

COAL—Cargo of — Spontaneous combustion — Liability of ship to contribute to general average - - - - - 431
See SHIPPING. 1.

COLLISION—Fog—Negligence in not going with moderate speed - - - - 251
See PRIVY COUNCIL APPEALS. 23.

—— Limitation of liability—"Owners"—Charterer by demise - - - - 126
See SHIPPING. 5.

COLLISION—*continued.*
—— Thames by-laws—Risk of Collision - 159
See SHIPPING. 6.

COLLISIONS AT SEA (REGULATIONS FOR PREVENTING), 1894, art. 16 - 251
See PRIVY COUNCIL APPEALS. 23.

COLONIES—Appeals from the.
See under PRIVY COUNCIL APPEALS.

COLUMBIA—British Columbia, Laws of.
See PRIVY COUNCIL APPEALS. 7, 8.

COMMISSION—Agency commission—Profits on sales in London—Transactions of purchase in the Colony - - - 46
See PRIVY COUNCIL APPEALS. 32.

COMPANY—Insurance companies.
See under INSURANCE, INSURANCE (FIRE), and INSURANCE (MARINE).

COMPENSATION—Election, right of—Estates in Scotland and Australia—Two separate wills—Right to equitable compensation - - - - - - 224
See PRIVY COUNCIL APPEALS. 30.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

CONDITION—Fidei-commissum primogenitura—Condition as to surname not authorized by the founder—Law of Malta - 551
See PRIVY COUNCIL APPEALS. 26.

—— In restraint of alienation—Grandchildren conditionally substituted—No right of accretion - - - - - - 541
See PRIVY COUNCIL APPEALS. 19.

CONSIDERATION—Uncertainty as to—Contract of sale of land—Specific performance refused - - - - - - 477
See PRIVY COUNCIL APPEALS. 35.

CONSPIRACY—Action against trade union—Actionable conspiracy—Misdirection—Resolutions of union calling a strike
See PRIVY COUNCIL APPEALS. 17. 514

CONSTABLE. *See* under POLICE.

CONTRACT—Electric light—"Generating light"—"Actual cost"—Construction of contract - - - - - - - 241
See PRIVY COUNCIL APPEALS. 20.

—— Sale of land—Specific performance refused—Uncertainty as to consideration 477
See PRIVY COUNCIL APPEALS. 35.

—— Ship—Contract of Carriage—Construction—Unseaworthiness—Exceptions - 16
See SHIPPING. 7.

CONTRIBUTION—Cargo of coal—Spontaneous combustion—Liability of ship to contribute to general average - - 431
See SHIPPING. 1.

CONVEYANCE — Conveyance void as unregistered—Limitation - - 60
See PRIVY COUNCIL APPEALS. 11.

CONVEYANCE—*continued.*
—— Sale of land for arrears of taxes—Prior registration of conveyance by defaulting owner—Actual purchase must be proved - - - - - - 82
See PRIVY COUNCIL APPEALS. 15.

"CONVEYANCE ON SALE"—Stamp duty—Conveyance executed in France—Consideration payable in England - 22
See REVENUE. 2.

COREA (CHINA AND)—Laws of.
See PRIVY COUNCIL APPEALS. 23, 24.

COSTS—"Actual cost"—Contract, construction of—Electric light—"Generating light" 241
See PRIVY COUNCIL APPEALS. 20.

—— Solicitor—Taxation.
See under SOLICITOR.

—— South Australia—Appeal does not lie as to costs - - - - - - - 454
See PRIVY COUNCIL APPEALS. 5.

CRIMINAL LAW—Practice — Appeal, Special leave to, in a criminal case—Appeal from Natal - - - - - - 248
See PRIVY COUNCIL APPEALS. 23.

CROWN—British Columbia Crown Procedure Act—Statutory duty to submit petition of right—Damages - - - 451
See PRIVY COUNCIL APPEALS. 8.

—— New Zealand Act—Prerogative not taken away except by express words—Special leave to appeal - - - - 448
See PRIVY COUNCIL APPEALS. 31.

CUSTODY—Innkeeper—Liability of goods deposited "expressly for safe custody"
See INNKEEPER. 357

DAMAGE AND DAMAGES—*Subsidence — Measure of damages—Risk of Future Subsidence—Remoteness—Working of Minerals.*
In assessing the damages recoverable by a surface owner for subsidence owing to the working of minerals under or adjoining his property, the depreciation in the market value of the property attributable to the risk of future subsidence must not be taken into account. To recover damages the surface owner must wait until the damage or injury caused by subsidence has happened.
Decision of the Court of Appeal, [1906] 2 Ch. 22, reversed, and decision of Swinfen Eady J., [1905] 2 Ch. 390, restored. WEST LEIGH COLLIERY COMPANY *v.* TUNNICLIFFE & HAMPSON, LD. - - - - H. L. (E). 27

—— Highway—Subsidence caused by mining operations—Action against wrong-doer—Measure of damages- - - 323
See HIGHWAY.

—— Landlord, Negligence of—Insanitary house—Right of wife and children to claim damages for illness - - - 176
See LANDLORD AND TENANT. 1.

DAMAGE AND DAMAGES—*continued.*

—— Petition of right, Statutory duty to submit —Damages for breach must be assessed by a jury - - - - - - **451**
See PRIVY COUNCIL APPEALS. 8.

—— Railway—Demurrage of trucks—Arbitration—Right of action for damages for detention—Jurisdiction - - **101**
See RAILWAY. 2.

—— Railway company — Passenger—Damages for personal injuries—Failure of railway servants to close carriage doors before starting the train - - - **352**
See RAILWAY. 1.

—— Trade mark, Assignment of—Breach of trade mark—Title to damages - **443**
See PRIVY COUNCIL APPEALS. 25.

—— Western Australian Transfer of Land Act, 1893—Wrongful registration—Measure of damages - - - - - - **235**
See PRIVY COUNCIL APPEALS. 6.

DEFAMATION—Libel—Trade protection society —Communications to subscribers not privileged - - - - - - **390**
See PRIVY COUNCIL APPEALS. 2.

DEMURRAGE — Charterparty — Exceptions — "Ejusdem generis" - - - **295**
See SHIPPING. 3.

—— Shipping—Contract for sale and delivery of coal by shipments—Construction as to clause for demurrage - - - **276**
See PRIVY COUNCIL APPEALS. 22.

—— Trucks—Right of action for damages for detention - - - - - - **101**
See RAILWAY. 2.

DENTIST—*Dentists' Register—Order of Medical Council to erase Name — "Professional Misconduct" — Partnership, Determination of — Dentists Act*, 1878 (41 & 42 *Vict. c.* 33), *ss.* 13, 14, 15.

One of the parties to a partnership deed between dentists was, as a director of the American Dental Institute, Limited, a party to self-puffing advertisements of the company in which it was alleged (inter alia) that among other advantages the instruments of the company were always sterilized before use, and that a trained lady nurse was always present at operations so as to prevent any possibility of scandal between an operator and a lady patient:—

Held, that the partner had been guilty of professional misconduct within the meaning of the partnership deed which entitled the other partner to determine the partnership.

Decision of the Court of Appeal, [1907] 2 Ch. 236, affirmed on the above ground.

CLIFFORD *v.* TIMMS - - **H. L. (E.) 12**
CLIFFORD *v.* PHILLIPS - **H. L. (E.) 15**

DISENTAILING ASSURANCE — Estate tail — Protector—Three persons appointed by settlor—Death of two—Power to appoint new protector - - - - - **97**
See SETTLEMENT.

DIVIDED PARISHES AND POOR LAW.
See under POOR LAW.

DIVORCE—British Columbia, Law of—Divorce jurisdiction of the Supreme Court **573**
See PRIVY COUNCIL APPEALS. 7.

DOMINION RAILWAY ACT, 1888 - - **54**
See PRIVY COUNCIL APPEALS. 14.

DRAINS.
See under SEWERS.

EJUSDEM GENERIS — Bill of lading — Construction—Ejusdem generis principle
See SHIPPING. 2. **406**

"EJUSDEM GENERIS"—Charterparty — Exceptions—Demurrage—Construction
See SHIPPING. 3. **295**

ELECTION—Right of—Estates in Scotland and Australia—Two separate wills - **224**
See PRIVY COUNCIL APPEALS. 30.

ELECTRIC LIGHT—Contract, Construction of—"Generating light—"Actual cost" **241**
See PRIVY COUNCIL APPEALS. 20.

EMPLOYER AND WORKMAN—*Compensation—Heat-stroke, Death by—Accident—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A workman, in a weak and emaciated condition, while raking out ashes from under the boiler in the stokehole of a steamship received a heat-stroke, from the effect of which he died:—

Held (by Lord Loreburn L.C. and Lord Ashbourne, Lord Macnaghten dissenting), that this was a case of death by accident within the meaning of the Workmen's Compensation Act, 1906.

ISMAY, IMRIE & CO. *v.* WILLIAMSON
H. L. (I.) 437

ESTATE TAIL — Disentailing assurance— Protector—Three persons appointed by settlor — Death of two — Power to appoint new protector - - - **97**
See SETTLEMENT.

EXECUTOR—No next of kin—Residue undisposed of—Beneficial title of executors
See WILL. **411**

FIDEI-COMMISSUM PRIMOGENITURA—Condition as to surname not authorized by the founder—Power to appoint—Law of Malta - - - - - **551**
See PRIVY COUNCIL APPEALS. 26.

FINES AND RECOVERIES—Estate tail—Disentailing assurance—Protector—Three persons appointed by settlor—Death of two—Power to appoint new protector
See SETTLEMENT. **97**

FIRE INSURANCE.
See under INSURANCE (FIRE).

FOG—Collision in dense fog—Negligence in not going with moderate speed - - **251**
See PRIVY COUNCIL APPEALS. 23.

FOREIGN GOVERNMENT—Treasury note of—Stamp—Promissory note or marketable security - - - - - - **92**
See REVENUE. 2.

FORGERY — Cheque — Forged indorsement — Payee — "Fictitious or non-existing person" - - - - - - **137**
See BANKER.

FRANCE—Stamp duty—Conveyance executed in France—Consideration payable in England - - - - - - **22**
See REVENUE. 2.

GENERAL AVERAGE—Shipping.
See under SHIPPING.

GLASGOW—Insurance—Professional — Widows' fund limited to members of a society—Contributor expelled from society—Glasgow Faculty of Procurators' Widows' Fund Act, 1833 - - - - **182**
See INSURANCE.

GOODS—Sale of.
See under SALE OF GOODS.

GREAT WESTERN RAILWAY COMPANY (RATES AND CHARGES) ORDER CONFIRMATION ACT, 1891—Demurrage of trucks - - - - **101**
See RAILWAY. 2.

GREECE—Declaration of trust in favour of the Greek Orthodox Church — Construction - - - - - - **65**
See PRIVY COUNCIL APPEALS. 10.

HARBOUR—Liability of harbour board—Powers of harbour-master—Negligence in removing and remooring vessels in port **271**
See PRIVY COUNCIL APPEALS. 21.

HEAT-STROKE—Death by—Accident—Workmen's compensation - - **437**
See EMPLOYER AND WORKMAN.

HIGHWAY — *Subsidence caused by Mining Operations — Action against Wrong-doer — Measure of Damages—Local Government—Urban Sanitary Authority—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 149—*Highways and Locomotives (Amendment) Act*, 1878 (41 *&* 42 *Vict. c.* 77), *ss.* 10, 27.

A mine extended under a highway which was vested under s. 149 of the Public Health Act, 1875, in the local authority. While working the mine the owners let down the surface of the highway, which the local authority, in good faith and on the opinion of skilled advisers, restored to its former level at great cost. An equally commodious road might have been made at less cost :—

Held, that the local authority were not entitled to raise the road to the old level, cost what it might and whether it was more commodious to the public or not, and were only entitled to recover from the mine owners what it would have cost to make the equally commodious road.

Decision of the Court of Appeal, [1907] 1 K. B. 78, reversed.

Decision of Jelf J., [1905] 2 K. B. 823, restored. LODGE HOLES COLLIERY COMPANY, LD. *v.* WEDNESBURY CORPORATION
H. L. (E.) 323

HONG KONG—Laws of.
See under PRIVY COUNCIL APPEALS.

HOTEL — Trade refuse — Removal — Dispute between occupier and sanitary authority —Appeal by special case - - **142**
See LONDON.

ICE—Bill of lading—Construction—"Inaccessible on account of ice" - - **406**
See SHIPPING. 2.

INCOME TAX—Colony, Transactions of purchase in—Profits on sales in London—Agency commission - - - **46**
See PRIVY COUNCIL APPEALS. 32.

—— Fire insurance company—Deductions for unexpired risks - - - - **207**
See REVENUE. 1.

INDEMNITY—Administration bond—Duration of sureties' liability - - - **371**
See PRIVY COUNCIL APPEALS. 1.

—— Land Law (Ireland) Act—Land Purchase Acts—Redemption of liability for rent out of estate indemnified therefrom—Right over indemnifying lands - **298**
See LANDLORD AND TENANT. 2.

—— Shipping—Demurrage, Construction as to clause for—Contract for sale and delivery of coal by shipments - - **276**
See PRIVY COUNCIL APPEALS. 22.

INLAND REVENUE.
See under REVENUE.

INNKEEPER—*Liability of, for Goods deposited "expressly for safe Custody"—Innkeepers Liability Act*, 1863 (26 *&* 27 *Vict. c.* 41), *s.* 1.

By the Innkeepers Liability Act, 1863 (26 & 27 Vict. c. 41), s. 1, "No innkeeper shall be liable to make good to any guest of such innkeeper any loss of . . . . goods or property brought to his inn . . . . to a greater amount than the sum of 30*l.* except in the following cases : (1.) Where such goods or property shall have been stolen . . . . through the wilful act, default or neglect of such innkeeper or any servant in his employ. (2.) Where such goods or property shall have been deposited expressly for safe custody with such innkeeper" :—

Held (affirming the decision of the extra or Third Division of the Court of Session, Lord Collins dissenting, (1908) S. C. 218), that to constitute an express deposit for safe custody within sub-s. 2 it must be proved that something was said or done by the guest whose property the goods were that would convey to the innkeeper the fact that the goods were being deposited with him for safe custody ; and that

INNKEEPER—*continued.*
the innkeeper received them into his charge with the intention of making himself liable for their safety. WHITEHOUSE *v.* R. & W. PICKETT **H. L. (Sc.) 357**

INSANITARY HOUSE—Negligence of landlord —Right of wife and children of tenant to claim damages for illness - - **176**
See LANDLORD AND TENANT. 1.

INSURANCE — *Professional — Widows' Fund limited to Members of a Society—Contributor expelled from Society—Right to remain a Contributor — Glasgow Faculty of Procurators' Widows' Fund Act*, 1833 (3 *Will.* 4, *c. lxiv.*).

In 1870 J. C. was entered a member of the Faculty of Procurators in Glasgow, a corporation established in 1796 by Royal Charter. At the same time J. C. became a member of a mutual insurance society styled "The Society of Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow." The Glasgow Faculty of Procurators' Widows' Fund, 1833, which constituted the society on a new basis, provided by s. 16 that no person should be admitted a member of the Faculty of Procurators without first paying entrance money to the widows' fund, and that after such payment the person so admitted as a member of the Faculty of Procurators should be "held and deemed a contributor to or member of the fund and entitled to the benefit thereof under the provisions of this Act." Under s. 18 every person who should be admitted a member of the said faculty should be bound to pay the society an annual contribution during his life; and under s. 9 one of the purposes of the fund was to pay pensions "to the widows and children of the members of said faculty who now are or may hereafter become entitled to the benefit of the fund under the provisions of this Act as hereinafter specified." By s. 26 the contributor was liable to forfeiture for non-payment of contributions; by ss. 27 and 28 he was entitled to redeem his contributions or renounce his interest in the society; but no express provision was made in the Act for the cessation of the contributions on the contributor ceasing to be a member of the faculty.

In 1899 J. C. pleaded guilty to a charge of embezzlement, and the Faculty of Procurators in Glasgow expelled him. The trustees of the Society of Contributors to the Widows' Fund of the Faculty of Procurators also removed J. C.'s name from the list of the society and refused to receive his contributions.

In 1904 J. C., his wife and children, raised an action for reduction of the minute of the society, whereby it was resolved that J. C. had ceased to be a contributor to the widows' fund:—

Held, reversing the decision of the First Division of the Court of Session (Earl of Halsbury and Lords Robertson and Collins dissenting), that according to the Act of 1833, when once any member of the Society of Procurators became a contributor to the widows' fund, he was entitled to continue a contributor, and was entitled to the benefits offered in exchange, even though he ceased to be a member of the Faculty of Procurators, the Act making no provision that

INSURANCE—*continued.*
a contributor must remain a member of the faculty till his death.

Decision of the First Division of the Court of Session, (1904) 7 F. 345, reversed. J. C. *v.* SOCIETY OF CONTRIBUTORS TO THE WIDOWS' FUND OF THE FACULTY OF PROCURATORS IN GLASGOW - - - - - **H. L. (Sc.) 182**

INSURANCE (FIRE)—Income tax—Deduction for unexpired risks — Fire insurance company - - - - - - **207**
See REVENUE. 1.

INSURANCE (MARINE) — *Constructive Total Loss—Test—Policy on Ship—Cost of Repair—Value of Wreck.*

In determining the question whether a ship seriously damaged by perils insured against can be treated as a constructive total loss, the test is whether a prudent uninsured owner would repair her having regard to all the circumstances. In this calculation the assured is entitled to add the break-up value of the ship to the estimated cost of repairs.

Angel v. *Merchants' Marine Insurance Co.*, [1903] 1 K. B. 811, overruled. MACBETH & CO., LD. *v.* MARITIME INSURANCE COMPANY, LD. - - - - - - - **H. L. (E.) 144**

2. —— *Warranty of Freedom from Capture —Capture of Neutral Ship by Belligerents—Subsequent Loss by Perils of the Sea—Total Loss —Condemnation — Relation back of Title of Captor.*

In a policy against perils of the sea the risk insured was only against total loss and "warranted free from capture." A neutral ship thus insured during the Russo-Japanese war was captured by the Japanese, and while being navigated towards a Court of Prize was wrecked and became a total loss. She was afterwards condemned in the Prize Court:—

Held, that there was in fact a total loss by capture and that the owner could not recover on the policy.

Decision of the Court of Appeal, [1908] 1 K. B. 601, affirmed on the above ground. ANDERSEN *v.* MARTEN - **H. L. (E.) 334**

INTERPRETATION ACT, 1886 - - - **54**
See PRIVY COUNCIL APPEALS. 14.

IRELAND—Land Purchase Acts—Redemption of liability for rent out of estate indemnified therefrom—Right over indemnifying lands - - - - - **298**
See LANDLORD AND TENANT. 2.

JUDGMENT—New Zealand Act—Prerogative not taken away except by express words—Special leave to appeal - **448**
See PRIVY COUNCIL APPEALS. 31.

JURISDICTION—British Columbia, Law of—Divorce jurisdiction of the Supreme Court - - - - - - - **573**
See PRIVY COUNCIL APPEALS. 7.

—— High Court—Case stated from quarter sessions—Enactment that order of the quarter sessions shall be final - **327**
See POLICE.

JURISDICTION—*continued.*

—— Hotel — Removal of refuse — Dispute between occupier and sanitary authority—Appeal by special case—Summary jurisdiction - - - - - - **142**
See LONDON.

—— Land Law (Ireland) Act, 1896—Land judge—Appeal - - - - - - **298**
See LANDLORD AND TENANT. 2.

—— Master — Costs — Solicitor — Taxation—Agreement by third party to pay costs
See SOLICITOR. **416**

—— Railway—Demurrage of trucks—Arbitration—Right of action for damages for detention - - - - - - **101**
See RAILWAY. 2.

JURY—Verdict of jury upheld—Order granting new trial set aside—Practice - **260**
See PRIVY COUNCIL APPEALS. 13.

JUSTICES—Police constable, Pension of—Case stated from quarter sessions—Enactment that order of the quarter sessions shall be final - - - - - **327**
See POLICE.

—— Prohibition without costs, Rule absolute against justices for—Appeal does not lie as to costs—South Australia - **454**
See PRIVY COUNCIL APPEALS. 5.

LADING—Bill of.
See under BILL OF LADING.

LAND—Contract of sale—Specific performance refused—Uncertainty as to consideration - - - - - - - **477**
See PRIVY COUNCIL APPEALS. 35.

—— Sale of land for arrears of taxes—Rights of purchaser who has obtained a certificate of sale - - - - - **82**
See PRIVY COUNCIL APPEALS. 15.

—— Sale of lands under Assessment Act, 1897—Notice in writing—Waiver—Law of Ontario - - - - - - **493**
See PRIVY COUNCIL APPEALS. 16.

LAND JUDGE—Jurisdiction—Appeal - **298**
See LANDLORD AND TENANT. 2.

LAND TRANSFER—Western Australian Transfer of Land Act, 1893—Wrongful registration—Measure of damages - - **235**
See PRIVY COUNCIL APPEALS. 6.

LANDLORD AND TENANT—*Insanitary House—Negligence of Landlord—Right of Wife and Children of Tenant to claim Damages for Illness.*

In Scotland, as well as in England, the wife and children of the tenant of a dwelling-house are not entitled to recover damages from the landlord for loss and injury through illness caused by the insanitary state of the premises, inasmuch as they were not parties to the contract of tenancy.

Cavalier v. *Pope*, [1906] A. C. 428, followed; *Hall* v. *Hubner*, (1897) 24 R. 875, dissented from.

Decision of the First Division of the Court of Session, (1907) S.C. 475, affirmed. CAMERON *v.* YOUNG - - - - - - **H. L. (Sc.) 176**

2. —— *Land Purchase Acts—Redemption of Liability for Rent out of Estate indemnified therefrom—Right over indemnifying Lands — Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *s.* 33, *sub-s.* 4—*Land Judge—Jurisdiction—Appeal.*

Where any liability for rent is apportioned and redeemed out of the purchase-money of lands sold under the Irish Land Purchase Acts, and a right of indemnity in respect of such liability exists against other lands :—

Held, that under s. 33, sub-s. 4, of the Land Law (Ireland) Act, 1896, the person who has paid the redemption price is entitled to an annuity on the indemnifying lands equal in amount to the portion of the rent which has been redeemed but ranking after the unredeemed portion of the rent.

Decision of the Court of Appeal in Ireland (reported as *In re Thomson's Estate*, [1907] 1 I. R. 311) reversed, and decision of Ross J., [1907] 1 I. R. 190, restored.

An appeal lies from the decision of the land judge to the Court of Appeal in Ireland, and from that Court to this House. DE VESCI (EVELYN VISCOUNTESS) *v.* O'CONNELL **H. L. (I.) 298**

—— Poor rate—Assessment — Sewage farm let by sewerage board to tenant - - **315**
See RATES. 2.

LEGISLATIVE ASSEMBLY.
See under PARLIAMENT.

LIBEL—Trade protection society—Communications to subscribers not privileged **390**
See PRIVY COUNCIL APPEALS. 2.

LICENCES—Licensing Acts.
See under LICENSING ACTS.

LICENSING ACTS — Brewers' Colonial ale licences — Storekeepers' licences—Law of South Australia - - - **487**
See PRIVY COUNCIL APPEALS. 4.

LIGHT—Electric light.
See under ELECTRIC LIGHT.

LIGHT RAILWAYS.
See under RAILWAYS.

LIMITATION—Conveyance void as unregistered
See PRIVY COUNCIL APPEALS. 11. **60**

LIMITATION OF LIABILITY — Collision — "Owners"—Charterer by demise **126**
See SHIPPING. 5.

LOCAL GOVERNMENT—Highway—Subsidence caused by mining operations—Action against wrong-doer — Measure of damages - - - - - - **323**
See HIGHWAY.

LOCAL GOVERNMENT—*continued.*
—— Poor law.
See under POOR LAW.

—— Sewers.
See under SEWERS.

LONDON—*Removal of Refuse—Hotel—Trade Refuse—Dispute between Occupier and Sanitary Authority—Decision of Petty Sessional Court "shall be final"—Appeal by Special Case—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 33—*Public Health* (*London*) *Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 33, *sub-s.* 2—*Metropolis Management Acts.*

In any dispute between the occupier of premises and the sanitary authority as to what is to be considered trade refuse, the decision of the magistrate under s. 33, sub-s. 2, of the Public Health (London) Act, 1891, is final, and no appeal will lie to the High Court, notwithstanding the Summary Jurisdiction Act, 1879, s. 33, which provides for the stating of a case upon a point of law upon the application of any person aggrieved by a decision of a magistrate.

Decision of the Court of Appeal, [1907] 1 K. B. 910, affirmed. WESTMINSTER CORPORATION *v.* GORDON HOTELS, LD. - **H. L. (E.) 142**

MAHOMEDAN LAW—Administration of wakf estate—Rights of wakifs—Scheme of administration—Charter of incorporation superseded - - - - **526**
See PRIVY COUNCIL APPEALS. 27.

MALTA—Laws of - - - - - **551**
See PRIVY COUNCIL APPEALS. 26.

MANITOBA—Laws of - - - - **504**
See PRIVY COUNCIL APPEALS. 9.

MARINE INSURANCE.
See under INSURANCE (MARINE).

MASTER—Jurisdiction of — Costs — Solicitor—Taxation—Agreement by third party to pay costs - - - - - **416**
See SOLICITOR.

MASTER AND SERVANT.
See under EMPLOYER AND WORKMAN.

MAURITIUS—Laws of - - - - **526**
See PRIVY COUNCIL APPEALS. 27.

MEDICAL COUNCIL—Order of, to erase name—Dentists' Register—"Professional misconduct"—Partnership—Determination of - - - - - - **12, 15**
See DENTIST.

MERCHANT SHIPPING.
See under SHIPPING.

METROPOLIS.
See under LONDON.

MINERALS.
See under MINES.

MINES—*Waterworks—Reservoir—Lands purchased by Agreement for the Purposes of Waterworks—Mines and Minerals purchased together with Lands—Right to support from Minerals under adjacent Land—Limit of Forty Yards—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 18–27.

Under a special Act, which gave the respondents power to purchase land by agreement, but not compulsorily, and incorporated the Waterworks Clauses Act, 1847, the respondents bought land from T., including all mines and minerals underneath, and also bought adjacent land from S., who reserved the right to work the coal underneath without making any compensation. The respondents constructed waterworks upon both pieces of land. The appellants, who were lessees of the coal from S., gave the respondents notice under s. 22 of the Waterworks Clauses Act, 1847, of their intention to work the coal under the land bought from S. The respondents gave no counter-notice:—

Held, that the land bought from T. having been bought by agreement enjoyed the common law right it had always possessed to lateral support from the land bought from S., this right not being affected by the Waterworks Clauses Act, 1847; and that the appellants were entitled to an injunction restraining the lessees from working the coal either within or beyond the forty yards belt round the waterworks so as to damage the land bought from T.

Decision of the Court of Appeal. *Manchester Corporation* v. *New Moss Colliery, Ld.*, [1906] 2 Ch. 564, affirmed. NEW MOSS COLLIERY, LD. *v.* MANCHESTER CORPORATION **H. L. (E.) 117**

—— Highway — Subsidence caused by mining operations—Action against wrong-doer—Measure of damages - - - **323**
See HIGHWAY.

—— Subsidence—Measure of damages—Risk of future subsidence—Remoteness—Working of minerals - - - - **27**
See DAMAGE.

MISCONDUCT — "Professional misconduct" — Dentists' Register — Order of Medical Council to erase name - - **12, 15**
See DENTIST.

MISDIRECTION — New trial — Action against trade union—Actionable conspiracy—Resolutions of union calling a strike **514**
See PRIVY COUNCIL APPEALS. 17.

NAME—Fidei-commissum primogenitura—Condition as to surname not authorized by the founder—Law of Malta - - **551**
See PRIVY COUNCIL APPEALS. 26.

NATAL—Laws of - - - - - **248**
See PRIVY COUNCIL APPEALS. 28.

NECESSARIES—Supplied on credit of ship—Claim of defendants as purchasers of ship—China and Corea - - **458**
See PRIVY COUNCIL APPEALS. 24.

NEGLIGENCE—Collision in dense fog—Negligence in not going with moderate speed 251
See PRIVY COUNCIL APPEALS. 23.

—— Harbour board, Liability of—Powers of harbour-master—Negligence in removing and remooring vessels in port 271
See PRIVY COUNCIL APPEALS. 21.

—— Landlord, Negligence of—Insanitary house—Right of wife and children of tenant to claim damages for illness - 176
See LANDLORD AND TENANT. 1.

—— Railway company — Failure of railway servants to close carriage doors before starting the train - - - 352
See RAILWAY. 1.

NEWFOUNDLAND—Laws of - - - 520
See PRIVY COUNCIL APPEALS. 33.

NEW SOUTH WALES—Laws of - - 224
See PRIVY COUNCIL APPEALS. 30.

NEW TRIAL — Action against trade union—Actionable conspiracy — Misdirection 514
See PRIVY COUNCIL APPEALS. 17.

NEW ZEALAND—Laws of - - - 46
See PRIVY COUNCIL APPEALS. 32.

NEXT OF KIN—Executors—No next of kin—Residue undisposed of—Beneficial title of executors - - - - - 411
See WILL.

NOTICE—Burgh sewers—Notice in writing to persons interested - - - 170
See SEWERS. 1.

—— Sale of lands under Assessment Act, 1897—Notice in writing—Waiver — Law of Ontario - - - - - - 493
See PRIVY COUNCIL APPEALS. 16.

NOVATION — Demurrage, Construction as to clause for — Contract for sale and delivery of coal by shipments - 276
See PRIVY COUNCIL APPEALS. 22.

ONTARIO—Canada—Laws of.
See PRIVY COUNCIL APPEALS. 11—17.

"**OWNERS**"—Collision—Limitation of liability—Charterer by demise - - - 126
See SHIPPING. 5.

PARLIAMENT—Constitution Act of New South Wales—Power to suspend an accused member until verdict - - - 470
See PRIVY COUNCIL APPEALS. 29.

—— Powers of Provincial Legislature—Appellate jurisdiction of Supreme Court of Canada—Limiting right of appeal ultra vires - - - - - - - 504
See PRIVY COUNCIL APPEALS. 9.

—— Powers of Provincial Legislature—Ontario Succession Duty Act—Provincial taxation of property not within the province ultra vires - - - - - 508
See PRIVY COUNCIL APPEALS. 12.

PARTNERSHIP—Determination of — Dentists' Register—Order of Medical Council to erase name—"Professional misconduct"
See DENTIST. 12, 15

PASSENGER—Railway company — Failure of railway servants to close carriage doors before starting the train - - 352
See RAILWAY. 1.

PAUPER—Poor law.
See under POOR LAW.

PENSION—Police constable—Case stated from quarter sessions—Enactment that order of the quarter sessions shall be final
See POLICE. 327

"**PERSON**" - - - - - - - - 54
See PRIVY COUNCIL APPEALS. 14.

PETITION OF RIGHT—Statutory duty to submit — Damages for breach must be assessed by a jury - - - 451
See PRIVY COUNCIL APPEALS. 8.

POLICE—*Pension of Police Constable—Justices—Quarter Sessions—Jurisdiction of the High Court — Practice — Case stated from Quarter Sessions—Enactment that Order of the Quarter Sessions shall be final—Police Act*, 1890 (53 & 54 *Vict. c.* 45), *s.* 11.

Where under s. 11 of the Police Act, 1890, there is an appeal to quarter sessions as to the amount of a constable's pension, the Court of quarter sessions may make such an order as appears to the Court just, and from that order there is no appeal.

Decision of the Court of Appeal, [1907] 2 K. B. 591, reversed.

Decision of the King's Bench Division (not reported) restored. KYDD *v.* LIVERPOOL WATCH COMMITTEE - - - - H. L. (E.) 327

POLICY—Insurance.
See under INSURANCE, INSURANCE (FIRE), AND INSURANCE (MARINE).

POOR LAW — *Settlement — Pauper — Parish, Division of—Destruction of Settlement—Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61)—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73).

A pauper, who has acquired a settlement in a parish which is afterwards divided into more than one parish, does not lose his settlement by the division.

Reg. v. *Tipton*, (1842) 3 Q. B. 215, and the other cases which followed that one, overruled as to the above point. WEST HAM UNION *v.* EDMONTON UNION - - - H. L. (E.) 1

POOR RATES.
See under RATES.

PRACTICE—Appeal.
See under APPEAL.

PREROGATIVE—New Zealand Act—Prerogative not taken away except by express words—Special leave to appeal - 448
See PRIVY COUNCIL APPEALS. 31.

PRESUMPTION—Executors—No next of kin—Residue undisposed of—Beneficial title of executors—Presumption of intention *See* WILL. 411

PRIMOGENITURA—Fidei-commissum — Condition as to surname not authorized by the founder—Law of Malta - - 551
See PRIVY COUNCIL APPEALS. 26.

PRINCIPAL AND SURETY — Administration bond—Duration of sureties' liability *See* PRIVY COUNCIL APPEALS. 1. 371

PRIVILEGE—Libel—Trade protection society—Communications to subscribers not privileged - - - - - 390
See PRIVY COUNCIL APPEALS. 2.

PRIVY COUNCIL APPEALS—AUSTRALIA—*Administration Bond—Duration of Sureties' Liability—Title of Beneficiaries to the Residue—Completion of the Administration—Deed of Indemnity.*

In a suit in 1904 by the respondents upon an administration bond executed in 1886 and conditioned for the due administration by their eldest sister of the estate of their mother, who had died intestate in 1885, the appellants as sureties thereto, so far as any misconduct on the part of the administratrix might be proved, pleaded a deed of indemnity duly executed in their favour by herself and the respondents, otherwise that the losses complained of did not result from misconduct as alleged, but from the acts and conduct of the three sisters after the estate had been fully and properly administered and whilst they were absolutely entitled to and in actual enjoyment of the property derived from the intestate :—

Held, on the evidence, overruling the High Court—(1.) that there had been no misconduct by the administratrix and no loss of assets in the course of administration ;

(2.) that the deed of indemnity was fully and properly explained to the respondents, to whom the appellants did not stand in any fiduciary relation, that they perfectly understood it, and that no independent advice could have made the matter clearer ;

(3.) that after the payment of the intestate's debts the three sisters were entitled to the residue of the estate in equal undivided shares, had consented so to enjoy it, and were jointly responsible for the mode in which it had been dealt with and lost.

Cooper v. *Cooper*, (1874) L. R. 7 H. L. 53, followed. BLAKE *v.* BAYNE - - **P. C. 371**

2. —— *Defamation—Libel—Trade Protection Society — Communications to Subscribers not privileged—Privilege founded on the General Interest of Society.*

A verdict for damages having been obtained in an action for libel against the respondents, who carried on the business of a trade protection society, that is, of obtaining information with reference to the commercial standing and position of persons in New South Wales and elsewhere, and in communicating such information confidentially to subscribers to the agency

PRIVY COUNCIL APPEALS—*continued.*

in response to their specific and confidential inquiries, the Full Court of New South Wales ordered a new trial, and the High Court of Australia entered judgment for the respondents :—

Held, that the orders of both Courts must be reversed. The occasion was privileged if the communication injurious to the plaintiffs' character was made in the general interest of society and from sense of duty ; not so, if it was made from motives of self-interest by those who for the convenience of a class trade for profit in the characters of other persons, and who offer for sale information which, however cautiously and discreetly sought, may have been improperly obtained. MACINTOSH *v.* DUN - **P. C. 390**

3. —— *Practice—Special Leave to Appeal refused.*

The High Court of Australia having decided, contrary to a decision of their Lordships, that a State had no power to impose income tax upon a salary paid by the Commonwealth to its officers, or to a member of the Commonwealth Parliament, resident in such State, the Commonwealth Parliament thereafter passed an Act expressly authorizing the States to impose such taxation :—

Held, that petitions for special leave to appeal from the High Court decisions must be refused, the amount at stake being inconsiderable, and the controversy having been closed. NEW SOUTH WALES TAXATION COMMISSIONERS *v.* BAXTER. WEBB *v.* CROUCH AND FLINT - - - - - - **P. C. 214**

—— **NEW SOUTH WALES**—Laws of.
See Nos. 29, 30, post.

4. —— **SOUTH AUSTRALIA** — *Brewers' Colonial Ale Licences—Storekeepers' Licences—Law of South Australia—Acts* 1901, *No.* 773 ; 1902, *No.* 784—*Act* 1905, *No.* 897, *s.* 5, *sub-s.* 2—*Construction.*

Held, that brewers' Colonial ale licences issued under South Australian Act of 1901, No. 773, are not storekeepers' licences within the meaning of s. 5, sub-s. 2, of the Act of 1905, No. 897, which regulates the working of local option. Act 1902, No. 784, ought not to be so applied as to alter the character of licences under the Act of 1901. MCGRATH *v.* ADELAIDE LICENSING JUSTICES - - - **P. C. 487**

5. —— *Practice — Appeal — Rule absolute against Justices for Prohibition without Costs—Appeal does not lie as to Costs.*

The Court, having made absolute a rule for prohibition at the instance of the appellants against the respondent justices, refused to order them to pay the appellants' costs :—

Held, an appeal did not lie. There had been no mistake of law, and the Court had exercised its judicial discretion. RIEKEN *v.* YORKE PENINSULA JUSTICES. KEAM *v.* ADELAIDE LICENSING JUSTICES - - - **P. C. 454**

6. —— **WESTERN AUSTRALIA**—*Land Transfer—Western Australian Transfer of Land Act*, 1893 — *Wrongful Registration — Measure of*

PRIVY COUNCIL APPEALS—*continued.*

Damages—Value of Buildings when Plaintiffs' Title accrued.

An Order in Council ([1906] A. C. 503) declared that the plaintiff, who was a remainderman, was entitled to damages under the Transfer of Land Act, 1893, for deprivation of title to the land in suit by reason of a certificate wrongfully issued to F. in 1875, and that the plaintiff's cause of action arose in 1903. It then remitted the case for the assessment thereof :—

Held (overruling the Court below), that the damages must be measured by including the value of the buildings on the land at the date when the cause of action accrued, and that the value of the buildings erected after the date of the certificate and before the accrual of the cause of action could not be excluded. SPENCER *v.* REGISTRAR OF TITLES - - - **P. C. 235**

—— **BRITISH COLUMBIA**—Laws of.
See Nos. 7, 8, below.

7. —— **CANADA** — *British Columbia — Divorce Jurisdiction of the Supreme Court—Law of British Columbia.*

The Supreme Court of British Columbia has jurisdiction to entertain a petition for divorce between persons domiciled in that Colony and in respect of matrimonial offences alleged to have been committed therein. WATTS AND ATTORNEY-GENERAL FOR BRITISH COLUMBIA *v.* WATTS - - - - - - **P. C. 573**

8. —— *British Columbia—Statutory Duty to submit Petition of Right—Damages for Breach must be assessed by a Jury—British Columbia Crown Procedure Act, s.* 4.

Under the British Columbia Crown Procedure Act, s. 4, it is the duty of the Provincial Secretary to submit to the Lieutenant-Governor a petition left with him as therein directed for that purpose. His definite refusal to do so gave the petitioner a cause of action involving damages which must be submitted to a jury. FULTON *v.* NORTON - - - **P. C. 451**

9. —— *Manitoba — Powers of Provincial Legislature—Appellate Jurisdiction of Supreme Court of Canada—Manitoban Act (R. S. M. C.* 110, *s.* 36) *limiting Right of Appeal ultra vires—British North America Act*, 1867, *s.* 101.

By s. 101 of the British North America Act, 1867, the Parliament of Canada was authorized to establish the Supreme Court of Canada, the existing statute being R. S. C. 1906, c. 139, ss. 35 and 36 of which define its appellate jurisdiction in respect of any final judgment of the highest Court of final resort now or hereafter established in any province of Canada.

The Manitoban Mechanics' and Wage Earners' Lien Act (R. S. M. c. 110, s. 36) applies to the suit under appeal and enacts that in suits relating to liens the judgment of the Manitoban Court of King's Bench shall be final and that no appeal shall lie therefrom :—

Held, that the provincial Act could not circumscribe the appellate jurisdiction granted by the Dominion Act. CROWN GRAIN COMPANY *v.* DAY - - - - - - - **P. C. 504**

PRIVY COUNCIL APPEALS—*continued.*

10. ——*North-West Territories—Declaration of Trust in favour of the Greek Orthodox Church —Construction—Ascertainment of Beneficiaries —Exclusion of Roman Catholic and Uniate Churches.*

Emigrants from Galicia settled in the North-West Territories from 1892, and in 1896 there were thirty Galician families in the neighbourhood of Star, who resolved to provide a place for religious worship and secure the services of a priest.

In Galicia the population is divided between Poles and Little Russians, the former being Roman Catholic, the latter Orthodox Greek, who, as a condition of being allowed to use their own liturgy and conduct their services in the old Slavonic language, are compelled to acknowledge the supremacy of the Pope, all else being allowed to remain Greek. There results a composite Church known as the Uniate Church, liable in Galicia to taxation by the Pope, in consequence of its enforced union with Rome.

The respondents, trustees of the Star congregation, on December 7, 1897, obtained from the Land Office a permit to cut logs for a church on the Government land in suit, " to be used in the erection of a church building for the mission of the Greek Orthodox Church, and for no other purpose " :—

Held, that this permit being an invitation to the trustees to build a church on the land in suit, the land became when the permit was acted on impressed in the hands of the Government with a trust for that purpose, and was dedicated by the Government to the use of the mission of the Greek Orthodox Church and not of the Roman Catholic or Uniate Church.

In an action by the appellants as representative members of the Star congregation for relief as for a breach of trust in consequence of the respondents having without previous consultation with the congregation appointed an Orthodox priest, it appeared that after the permit was granted the lands in suit had been irregularly granted by the Land Office to the Roman Catholic bishop of the diocese in which Star was situated, " in trust for the purposes of the congregation of the Greek Catholic church " at Star, and had been by the bishop assigned to the respondents with the sanction of the Land Office, but without any alteration in the declaration of trust contained in the grant to the bishop :—

Held, that the operative trust was that created by the permit, and that there had been no breach thereof. ZACKLYNSKI *v.* POLUSHIE **P. C. 65**

11. —— *Ontario — Conveyance void as unregistered—Limitation—R. S. O.*, 1897, *c.* 136, *s.* 17—*R. S. O.*, 1897, *c.* 133, *ss.* 4, 22.

S., having obtained a registered conveyance of the land in suit from one of the respondents, executed, more than ten years before action, a reconveyance to both respondents, indorsing thereon a forged certificate of registration, and later on mortgaged it to the appellants within the said ten years :—

Held, that under s. 87 of the Registry Act, R. S. O. c. 136, the reconveyance was void

PRIVY COUNCIL APPEALS—*continued.*

against the appellants, who had advanced their money without notice of it.

Held, also, that the respondents were not protected by the Limitation Act (R. S. O. c. 133). The reconveyance was valid between the parties thereto, and no action could have been brought against them before the date of the appellants' mortgage, which was within the statutory period. McVITY *v.* TRANOUTH - - - **P. C. 60**

12. —— *Ontario—Powers of Provincial Legislature—British North America Act*, 1867, *s.* 92, *sub-s.* 2—*Ontario Succession Duty Act*, (*R. S. O.*, 1897, *c.* 24)—*Provincial Taxation of Property not within the Province ultra vires.*

It is ultra vires the Legislature of Ontario to tax property not within the province : see British North America Act, 1867, s. 92, sub-s. 2 :—

Held, accordingly, that the Succession Duty Act (R. S. O., 1897, c. 24) does not include within its scope movable properties locally situated outside the province of Ontario which it was alleged that the testator, a domiciled inhabitant of the province, had transferred in his lifetime with intent that the transfers should only take effect after his death.

Blackwood v. *Reg.*, (1883) 8 App. Cas. 82, followed. WOODRUFF *v.* ATTORNEY-GENERAL FOR ONTARIO - - - - - **P. C. 508**

13. —— *Ontario—Practice—Verdict of Jury upheld — Evidence properly submitted — Order granting New Trial set aside—Practice—Special Leave to cross appeal nunc pro tunc.*

In an action for damages against the appellants for loss of life occasioned by the negligent management of their tramcar by their servant employed to drive it, the jury found that the servant was guilty of negligence in causing the accident and that the deceased was not guilty of contributory negligence, and judgment was accordingly entered for the plaintiffs :—

Held, that the Court in appeal from that judgment was in error in setting it aside and ordering a new trial, there having been evidence on both issues properly submitted to the jury. It is not valid ground for ordering a new trial that the judges differ from the conclusion at which the jury have arrived or consider that the findings shew that the defendants had not had a fair and unprejudiced trial. Special leave to the respondents to cross appeal against the order for a new trial granted nunc pro tunc ; the appeal praying that the action should be dismissed. TORONTO RAILWAY COMPANY *v.* KING **P. C. 260**

14. —— *Ontario—Railway—British North America Act*, 1867, *s.* 91, *sub-s.* 29 ; *s.* 92, *sub-s.* 10 (*a*)—*Dominion Railway Act of* 1888, *ss.* 187 *and* 188, *intra vires—Interpretation Act* (*R. S. C.*, 1886, *c.* 1), *s.* 7, *sub-s.* 2—*Construction* —" *Person.*"

The Railway Committee of the Privy Council of Canada, by order made under ss. 187 and 188 of the Dominion Railway Act (51 Vict. c. 29), directed certain measures to be taken for safeguarding the respondents' railway, which is a through railway, and for the protection of the public in traversing it at certain level crossings

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where it passes across public streets at points within or immediately adjoining the boundary of the appellant city, and directed the cost thereof to be borne in equal proportions by the railway and the city.

In a suit by the railway after the execution of works as directed to recover the apportioned amount from the corporation :—

Held, that ss. 187 and 188 were intra vires of the Dominion Legislature by force of the British North America Act, 1867, s. 91, sub-s. 29, and s. 92, sub-s. 10 (*a*).

Held, also, that, having regard to s. 7, sub-s. 2, of the Interpretation Act (R. S. C., 1886, c. 1), "person" in s. 188 includes a municipality. CITY OF TORONTO CORPORATION *v.* CANADIAN PACIFIC RAILWAY COMPANY - - **P. C. 54**

15. —— *Ontario—Sale of Land for Arrears of Taxes—R. S. O.*, 1887, *c.* 23, *ss.* 20, 26—*Rights of Purchaser who has obtained a Certificate of Sale—R. S. O.*, 1887, *c.* 193, *s.* 184—*Prior Registration of Conveyance by defaulting Owner—Actual Purchase must be proved.*

Held that, according to the true construction of ss. 20 and 26 of R. S. O., 1887, c. 23, the purchaser at a Government sale of lands for arrears of taxes who has obtained a certificate of sale under s. 20 becomes the effective owner thereof if the defaulting owner does not redeem within one year, and is absolutely entitled to a conveyance under s. 26, notwithstanding that the certificate is in the possession of the defaulting owner.

Held, further, that the plaintiff, who claimed title under a conveyance from the defaulting owner registered prior to the purchaser's, obtained under s. 26, could not rely on an alleged redemption by him after the expiration of one year, but must in order to succeed prove a valid written transfer to him by the purchaser of the lands in suit.

The purchaser having failed to obtain and register his deed of conveyance under s. 20 within eighteen months after the sale :—

Held, that priority of registration by the plaintiff did not avail under R. S. O., c. 193, s. 184, sub-s. 1, applicable to the case by virtue of s. 31 of the said c. 23, in the absence of proof of his actual purchase. MCCONNELL *v.* BEATTY **P. C. 82**

16. —— *Ontario—Sale of Lands under Assessment Act*, 1897—*Notice in Writing under s.* 184, *sub-s.* 3 — *Construction — Waiver — Effect of* 3 *Edw.* 7, *c.* 86, *s.* 8—*Law of Ontario.*

The plot of land in suit in the city of Toronto belonging to the respondent was advertised to be sold on April 10, 1901, under Ontario Assessment Act, 1897, for arrears of taxes, and after an adjournment was bought by the appellants on April 24. The appellants in the interval had advertised their intention to purchase in case the amount bid was less than the arrears due, but omitted to give the respondent a notice in writing under s. 184, sub-s. 3, to that effect.

In an action by the respondent in September, 1906, to set aside the sale on the grounds (1.) that the land was insufficiently described in the

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assessment roll; (2.) that he did not receive the said notice :—

Held, (1.) that s. 8 of 3 Edw. 7, c. 86, cured the defect (if any) in the assessment roll; (2.) that the Act intended that the notice under s. 184, sub-s. 3, should be given to the owner, but that the respondent could and did waive it; otherwise that the failure to give it was within the words of the said s. 8 and was cured by it.

Held, further, with regard to the respondent's alternative claim to redeem, that the period of one year from the date of sale allowed by the Assessment Acts of 1892 and 1897 had not been altered by subsequent legislation in any manner applicable to this case. TORONTO CORPORATION *v.* RUSSELL - - - - - - **P. C. 493**

17. —— *Ontario — Trade Union, Action against — Actionable Conspiracy — Misdirection —Resolutions of Union calling a Strike—New Trial.*

In an action against the appellants alleging that they had conspired to injure the plaintiffs in the conduct of their business, and that in pursuance of the conspiracy the union whom they represented caused the plaintiffs' men to go out on strike, the judge in effect directed the jury that if the resolutions of the union calling out the plaintiffs' men were the cause of the strike they were an actionable wrong, without regard to the motive and without regard to the conspiracy alleged :—

Held, that this direction could not be supported and that there must be a new trial. JOSE *v.* METALLIC ROOFING COMPANY OF CANADA, LD. - - - - - - - - **P. C. 514**

18. —— *Quebec — Arbitration — Arbitrators as to Value of Land expropriated also appointed Mediators — Award set aside — Terms of Submission exceeded—Law of Arbitration—Railway Act*, 1903 (*Canada*, 3 *Edw.* 7, *c.* 58), *s.* 161.

Where arbitrators were appointed under deeds of submission to value three expropriated lots of ground and the indemnity for damages, it being declared that they should act as mediators (*amiables compositeurs*) but should be bound to conform to the provisions of art. 161 of the Railway Act, 1903, and the award in lieu of valuing the third lot in money ordered that the expropriators should return it in part and construct a road on their own adjoining land, to be maintained by them in perpetuity for the benefit of the parties expropriated :—

Held, that arbitrators who are also appointed mediators cannot disregard their instructions, and that the error vitiated the whole award. QUEBEC IMPROVEMENT COMPANY *v.* QUEBEC BRIDGE AND RAILWAY - - **P. C. 217**

19. —— *Will—Gift to Children—Conditions in restraint of Alienation — Enjoyment of Usufruct — Grandchildren conditionally substituted—No right of Accretion—Construction of Will.*

A testator directed that his estates should be divided into seven shares amongst his seven children, the children to have the usufruct and enjoyment of all his property, and, on the decease of his children or any of them, the

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children to be born of their respective marriages to have the full proprietary right and interest therein. To his grandchildren thus substituted for his children he gave the right to use, enjoy, or dispose of the same as it might seem good to them, instituting them for this purpose his universal legatees.

He prescribed three conditions : (1.) that the property bequeathed to his children should not be assignable, or capable of being seized by their creditors; (2.) that it should not be sold or alienated under any pretext, but should pass "*en nature*" to his grandchildren; (3.) that the grandchildren should not alienate the share of the property which should belong in usufruct to their respective fathers or mothers before the said usufruct had come to an end :—

Held, that the effect was that each child was entitled to his specific share which had been ascertained by partition, confirmed by 60 Vict. c. 95, as sole proprietor subject to the condition of handing it over to his children at his death; and that there was no right of accretion amongst either the testator's children or grandchildren. Consequently the share in suit of one of the children who died in 1902 without issue passed under his will to his executor. PRÉVOST *v.* PRÉVOST - - - - - - **P. C. 541**

20. —— **CAPE OF GOOD HOPE**—*Electric Light—Contract, Construction of—"Generating Light" includes Distribution as well as Production—"Actual Cost" includes Depreciation, Rent, Rates, Taxes, and Insurance.*

The respondents were under contract to establish an electric light central station in B., and to supply light to the inhabitants and to the streets, public places, and private property, and, in order to carry out that undertaking, to do certain specified things and to provide everything which might be necessary, whether specified or not, for the purpose of supplying electric light to the street lamps. In consideration thereof the appellants by the same contract were bound to pay "at such rates as will yield to the contractors a return equal to 10 per cent. over the actual cost of generating the light" :—

Held that, according to the true construction of this contract, "generating the light" covered the whole series of operations leading up to the production of the light in the street lamps, and the "actual cost" thereof covered all that the production of the light cost, including depreciation of plant, rent, rates, taxes of the electric works and buildings, and insurance. BULAWAYO MUNICIPALITY *v.* BULAWAYO WATERWORKS COMPANY - - - - - - **P. C. 241**

21. —— *Harbour Board, Liability of — Powers of Harbour-master—Negligence in removing and remooring Vessels in Port — Cape Colony Act* 36 *of* 1896.

The place and method of mooring vessels within a port are within the authority of the harbour-master or port captain.

Reney v. *Magistrates of Kirkcudbright*, [1892] A. C. 264, followed.

Where by a harbour-master's orders two vessels were removed from moorings and

PRIVY COUNCIL APPEALS—*continued.*

negligently remoored and retained in new positions so that on the occurrence of an extraordinary flood both were carried away and lost :—

Held, that the appellants, a harbour board, constituted by Cape Colony Act 36 of 1896, were liable for the acts of their officer. EAST LONDON HARBOUR BOARD *v.* CALEDONIA LANDING, SHIPPING, AND SALVAGE COMPANY. EAST LONDON HARBOUR BOARD *v.* COLONIAL FISHERIES COMPANY - - - **P. C. 271**

22. —— *Shipping — Demurrage — Contract for Sale and Delivery of Coal by Shipments—Construction as to Clause for Demurrage—Consignors not limited to the Shipowners' Claim—Indemnity—Novation.*

In an action by the vendors and consignors of coals under a contract binding the consignee to accept delivery to the railway authorities immediately on their arrival in port "at the rate of 120 tons per day for sailers and 250 tons per day by steamers," or to be "liable for demurrage at 4*d.* per net registered ton per day for sailers and 6*d.* per net registered ton per day for steamers," to recover demurrage in respect of eight ships calculated according to the specified rate :—

Held, that both upon the plain words of the contract, and also as explained by the action, conduct, and mode of dealing of the parties antecedent to its date, it was an absolute and not an indemnity contract. It could not be so construed as to import into it a condition that the consignee was only liable to pay the amount of demurrage due by the consignors under the terms of their charterparties, so far as it did not exceed the contractual total.

Held, also, that by the indorsement and delivery of eight bills of lading in respect of these cargoes (only three of which incorporated the conditions of the charterparties), the consignee did not become bound by way of novation to pay demurrage as stipulated by the charterparties, and was not discharged from the obligation in respect thereof as imposed by the contract sued upon.

Even if the contract had been strictly c.i.f. there is no rule of law that a vendor thereunder, who is also consignor, may not secure for himself a profit under a demurrage clause; nor any indisputable presumption of law that the parties did not so intend. HOULDER BROTHERS & CO. *v.* COMMISSIONER OF PUBLIC WORKS. COMMISSIONER OF PUBLIC WORKS *v.* HOULDER BROTHERS & CO. - - - - **P. C. 276**

23. —— **CHINA AND COREA** — *Shipping—Collision in dense Fog—Negligence in not going with moderate Speed—Failure to stop and ascertain Position of the Vessels—Art.* 16 *of Regulations under Merchant Shipping Act*, 1894.

Art. 16 of the King's Regulations, which is in the same terms as art. 16 of the Regulations under the Merchant Shipping Act, 1894, ought to be most carefully adhered to in order to avert the danger of collision in thick weather.

Where a collision took place in a dense fog off the Shantung Promontory, North China, and the judge held that the appellants' vessel was solely to blame for not stopping and going at a speed of 9½ knots an hour in the fog which prevailed :—

Held, in appeal, that the respondents' vessel must be pronounced in part to blame, and that her commander should be held guilty of negligence contributing to the collision in that he was going at a speed of about 6·8 knots an hour, which, having regard to the weather and the circumstances of the case, was not a moderate speed within the meaning of the article, and that by not stopping her engines after hearing the first signals by the appellants' vessel, until he could ascertain her position with certainty and what she was doing, he failed to comply with its directions. CHINA NAVIGATION COMPANY (OWNERS OF SS. CHINKIANG) *v.* COMMISSIONERS FOR EXECUTING THE OFFICE OF LORD HIGH ADMIRAL OF THE UNITED KINGDOM. CHINA NAVIGATION COMPANY (OWNERS OF SS. CHINKIANG) *v.* LEATHAM - **P. C. 251**

24. —— *Shipping — Necessaries supplied on Credit of Ship—Claim of Defendants as Purchasers of Ship—Admiralty Court Act*, 1861, *s.* 5 *—China and Corea Order in Council*, 1904, *s.* 100.

In an action in rem against a ship under s. 5 of the Admiralty Court Act, 1861, for necessaries supplied to B. on the credit of the ship, it appeared that the registered owners were trustees mainly for the defendants as purchasers who had paid to B. nearly the whole of the purchase-money before the necessaries were supplied, B.'s interest being to the extent of a small balance of purchase-money and subject to the obligation of delivery of the ship to the appellants according to his contract :—

Held, that the plaintiffs were entitled to recover. Their claim against the ship was paramount to that of the defendants for the delivery thereof under their contract with B. FOONG TAI & CO. *v.* BUCHHEISTER & CO. - **P. C. 458**

25. —— **HONG KONG**—*Trade Mark—Assignment of Trade Mark—Breach of Trade Mark—Title to Damages.*

In an action for infringement of trade marks it appeared that the business of selling watches in Hong Kong affected thereby did not belong to the plaintiffs and was not carried on for their benefit, but that they as manufacturers supplied to it the watches sold :—

Held, that they must be nonsuited for want of title to maintain the action. ULLMANN & CO. *v.* CESAR LEUBA - - - **P. C. 443**

—— **COLUMBIA**—British Columbia—Laws of.
See Nos. 7, 8, ante.

—— **COREA**—China and Corea—Laws of.
See Nos. 23, 24, above.

26. —— **MALTA**—*Code of Rohan, bk.* 4, *c.* 2, *ss.* 3 *and* 4—*Fidei-commissum Primogenitura—Duration of Tenure until Fourth Gradus—Construction of Gradus—Condition as to Surname not authorized by the Founder—Power to appoint —Law of Malta.*

The entailed Maltese property in suit was

PRIVY COUNCIL APPEALS—*continued.*

subjected by will in 1790 to a fidei-commissum unto the fourth degree in terms of the Code of Rohan (bk. 4, c. 2, ss. 3 and 4), which directed that after the fourth degree every tie and burden shall cease, and the property shall pass unburdened to the heir of the fourth and last substitute, the four degrees being counted in capita and not in stirpes without including therein the instituted heir.

The testator's son in 1839, having no children, under a power of appointment contained in the said will, created a primogenitura in favour of his universal heir and grand-nephew P. " in terms always of the said paternal will and unto the fourth degree contemplated in the said paternal will and allowed by the laws now in force " to endure as long as the fidei-commissum founded by his said father " under the fetters pacts laws and conditions hereinafter stated."

One of these conditions was that in the event which happened of failure of male descent the primogenitura should pass to his only daughter, whose male child when born was to enjoy the primogenitura during his natural life, and after his death it was to pass to his male descent until the exhaustion of the four degrees, with the proviso " that any holder of the said primogenitura descended from a female shall be bound to add the surname ' Bonici ' to his own on penalty of forfeiting the possession of the said primogenitura, which on such contingency occurring shall pass, ipso facto, to the person next called thereto." The said only daughter had sons living at her father's death, including the appellant and respondent, so that the entailed property never came into her possession, but into that of the appellant, her firstborn son.

In a suit for a declaration that the appellant, who had been in possession of the property in suit for twenty-two years without taking the name of Bonici, had forfeited his right thereto, and that the same had devolved ipso facto on the respondent, his younger brother, it was pleaded that the condition as to name was not warranted by the will of 1790, and that the appellant, as holder in the fourth degree after that of the instituted legatee, was entitled to keep the property free from any burden :—

Held, that there was no indication in the will of 1790 of a desire on the part of the founder of the fidei-commissum that the beneficiaries should bear his name, and that the power of appointing a primogenitura given thereby did not include an authority to impose that condition on its successive holders.

Held, also, that on the true construction of ss. 2 and 3 of the code the four degrees mentioned therein are degrees of generation and not of actual possession, and therefore include the generation to which the mother of the parties belonged, so that the appellant was the fourth and last substitute. But *quære*, whether under the like construction he holds the property unburdened, or whether it remains burdened until after it has passed to his heirs. STRICKLAND *v.* STRICKLAND - - - **P. C. 551**

MANITOBA—Laws of.
See No. 9, ante.

PRIVY COUNCIL APPEALS—*continued.*

27. —— **MAURITIUS** — *Mahomedan Law—Administration of Wakf Estate — Rights of Wakifs—Practice of Court—Scheme of Administration—Charter of Incorporation superseded.*

The wakf properties in suit, situate at Port Louis, in the island of Mauritius, were as to a considerable portion of them successively purchased from 1852 onwards " for the whole Mahomedan congregation of the island," consisting of Indian immigrants from Cutch, Hallal, and Surat, all of the Soonee school, and their descendants, and were dedicated by the deeds inalienably for the purpose of a mosque. The overwhelming majority of the congregation belonged to the Cutchee class, and in 1877 the deeds of purchase for the first time declared that the properties comprised therein were bought on behalf of the Cutchees, a committee of whom was to administer them and all the other properties belonging to the mosque. Later purchases were expressed to be made, some on behalf of the Cutchees, others on behalf of the congregation. In 1903 two deeds were executed by a body of Cutchees by which they formed themselves into a society afterwards incorporated under Ordinance 22 of 1874 for certain pious and charitable purposes, declared that they brought into the society in full ownership all the said purchased properties, with extensive powers of selling and letting the same, other than the mosque and its accessories, of which latter they reserved to themselves the exclusive management.

In actions brought respectively by the Hallaye and Soortee classes the Court below ordered the deeds to be set aside so far as they gave exclusive administration as of right to the Cutchees, and substituted for the portion thus set aside a scheme giving to the plaintiffs a share in the administration, but subject to future modifications :—

Held, in appeal, that as the deeds could not be maintained consistently with the rights of the plaintiffs they should be set aside in toto.

Held, further, that as the charter of incorporation in consequence became inoperative, the amending scheme must also be set aside. The Court could neither grant a new charter nor under the circumstances amend the superseded one. IBRAHIM ESMAEL *v.* ABDOOL CARRIM PEERMAMODE. IBRAHIM ESMAEL *v.* ABOO BAKAR MAMODE TAHER - - - **P. C. 526**

28. —— **NATAL**—*Practice—Special Leave to appeal in a Criminal Case.*

Special leave to appeal in a criminal case was refused in a case of disputed evidence, on which the judges had differed.

In re Dillet, (1887) 12 App. Cas. 459, followed. TSHINGUMUZI *v.* ATTORNEY-GENERAL OF NATAL - - - - - **P. C. 248**

29. —— **NEW SOUTH WALES** — *Constitution Act of New South Wales, No.* 32, 1902, *s.* 15 *—Validity of Standing Order of the Legislative Assembly—Power to suspend an Accused Member till Verdict—Order not punitive but preventive.*

A standing order of the Legislative Assembly of New South Wales made under the power given to it by Constitution Act No. 32 of 1902, s. 15, and approved by the Governor, empowered the

PRIVY COUNCIL APPEALS—*continued.*

House to suspend from the service of the House a member charged with an offence until a verdict given or further order :—

Held, that the standing order, being to regulate the orderly conduct of the Assembly, was within the terms of the power conferred. The House was sole judge as to the occasion requiring it; and a Court of law could not question its validity so long as it related to orderly conduct. Accordingly a suspension under it till verdict given of the respondent, who had been charged with a criminal offence, made with a view to defend the regularity of its proceedings and not by way of punishment, was enforceable against him. HARNETT *v.* CRICK - - **P. C. 470**

30. —— *Will—Election, Right of—Estates in Scotland and Australia — Two separate Wills forming one Scheme of Testamentary Intention—Testator's Widow electing to take against one cannot claim under the other—Right to equitable Compensation.*

By two testamentary instruments, called respectively a British will and an Australian will, a testator domiciled in Scotland made a complete disposal of his estates, British and Australian, directing that the British will should be construed and administered according to the law of Scotland, the Australian will according to the law of New South Wales. His widow, on his death without issue, obtained a decree of the Court of Session in Scotland establishing her legal right in name of jus relictæ and terce, with consequential relief, the Court declining jurisdiction as against the Australian trustees. Under a summons issued in the Supreme Court of New South Wales by the respondent-trustees of the Australian will, the widow claimed the beneficial dispositions in her favour contained therein; the Court decided in her favour, and an appeal therefrom was instituted by the above appellant, party thereto, who took beneficially under the Scottish will, but not under the Australian:—

Held, that the two instruments formed one will containing a coherent scheme of intention, and that the widow, having elected to defeat the will in part, could not claim under it, and accordingly took no interest under the Australian will.

Held, also, that the appellant had a locus standi to maintain the appeal, being interested in protecting the Australian estate in order to compensate those who had been deprived of benefits under the will by the widow's election. DOUGLAS-MENZIES *v.* UMPHELBY - **P. C. 224**

31. —— **NEW ZEALAND** — *Practice — Appeal—Judgment final and conclusive—Prerogative not taken away except by express Words—Special Leave to Appeal—New Zealand Act* 58 *Vict., No.* 43, *s.* 93.

Sect. 93 of New Zealand Act 58 Vict., No. 43, declares that the decisions of the Native Appellate Court established thereby shall be "final and conclusive," but does not expressly exclude His Majesty's prerogative :—

Held that, the legal rights subjected to the said Court being rights in the matters of land, succession, and probate, an appeal would have lain to His Majesty if the said Court had not been established and could not be taken away except by express words.

Théberge v. *Laudry*, (1876) 2 App. Cas. 102, and *Cushing* v. *Dupuy*, (1880) 5 App. Cas. 409, distinguished. *In re* WI MATUA'S WILL - **P. C. 448**

32. —— *Revenue — Income Tax—Profits on Sales in London—Transactions of Purchase in the Colony — Agency Commission — Profits not derived from Business in the Colony — New Zealand Land and Income Tax Assessment Act*, 1900, *s.* 51.

Where the appellants' profits consisted of a commission deducted by them from moneys received in London under agency contracts of sales effected in London of goods brought from New Zealand as a result of transactions made by them in that Colony :—

Held, that the profits were actually made in London, and that the earlier transactions in New Zealand were insufficient to render those profits taxable under the New Zealand Land and Income Assessment Act (49 of 1900), s. 51, as profits derived from business carried on in that Colony. LOVELL & CHRISTMAS, LD. *v.* COMMISSIONER OF TAXES - - - **P. C. 46**

33. —— **NEWFOUNDLAND** — *Railway — St. John's Street Railway Act*, 1896, *s.* 42—*Construction— Conditional Power to remove Snow from Railed Tracks—Implied Obligation to remove Snow from the Streets—Law of Newfoundland.*

The respondents were empowered by s. 42 of their charter to remove snow and ice from their tracks so as to enable them to operate their cars, conditioned upon their levelling the said snow and ice on each side of the tracks to a uniform depth to be determined by the appellant's engineer and so as not to impede the ordinary traffic of the streets :—

Held that, if removal of some of the snow from the streets was necessary to comply with the engineer's undisputed requirement as to level, such removal, though not expressly prescribed, must be effected by the respondents, as physically necessary to the fulfilment of the condition. SHEA *v.* REID-NEWFOUNDLAND COMPANY **P. C. 520**

34. —— **STRAITS SETTLEMENT** — *Settlement of Singapore—English Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47 — *Straits Settlements Bankruptcy Ordnance of* 1888, *s.* 45 *—Construction— Conveyance by Settlor to himself as Trustee—Voluntary Settlement.*

Under s. 47 of the Bankruptcy Act, 1883, in order that a settlement may be valid the property comprised therein must pass from the settlor to the trustee :—

Held, that this provision is complied with where a settlor has altered his position from that of beneficial owner to that of a trustee for his wife and children, though ultimately and on their default for himself. SHRAGER *v.* MARCH **P. C. 402**

35. —— **TRANSVAAL**—*Contract of Sale of Land—Construction — Specific Performance refused—Uncertainty as to Consideration.*

Held, that specific performance could not be

PRIVY COUNCIL APPEALS—*continued.*
decreed of a contract between the plaintiff and defendant by which the latter agreed to transfer to the former a farm in the Transvaal on which deposits of tin ore had been found in consideration of 3700 shares of 5*l.* each in a syndicate to be formed for the "purpose of developing" the same as a mining property, the 3700 shares to represent the appellant's holding in a syndicate of 12,000 shares.

The price to be paid by the plaintiff was wholly uncertain. It was to consist of shares in a syndicate whose purpose of development there was no evidence to define, either as to the nature and extent of the operations contemplated or as to what the parties meant by it, the value of the shares depending upon the adequacy of working capital which was neither ascertained nor ascertainable. DOUGLAS *v.* BAYNES - **P. C. 477**

—— **WESTERN AUSTRALIA.** *See* No. 6, ante.

PROHIBITION—Rule absolute against justices for prohibition without costs—Appeal does not lie as to costs—South Australia **454**
See PRIVY COUNCIL APPEALS. 5.

PROMISSORY NOTE—Stamp—Treasury note of foreign Government - - - **92**
See REVENUE. 3.

PROTECTOR—Estate tail—Disentailing assurance — Protector — Three persons appointed by settlor — Death of two — Power to appoint new protector - **97**
See SETTLEMENT.

PROVINCIAL LEGISLATURE—Powers of.
See under PRIVY COUNCIL APPEALS.

PUBLIC HEALTH—Highway.
See under HIGHWAY.

—— Hotel—Removal of refuse—Dispute between occupier and sanitary authority—Appeal by special case - - - - - **142**
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—— Rates—"Land used only as a railway" **293**
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See under SEWERS.

PUBLIC HEALTH (SCOTLAND)—Burgh sewers — Notice in writing to persons interested - - - - - **170**
See SEWERS. 1.

QUARTER SESSIONS — Case stated from — Enactment that order of the quarter sessions shall be final—Pension of police constable - - - - - **327**
See POLICE.

QUEBEC—Laws of - - - - - **217**
See PRIVY COUNCIL APPEALS. 18.

RAILWAY — *Negligence—Railway Company—Failure of Railway Servants to close Carriage Doors before starting the Train — Passenger — Damages for Personal Injuries.*

In an action of damages for personal injuries brought by a passenger against a railway company the pursuer averred that while standing on the platform of their station he was struck and injured by an open carriage door. That it was the duty of the defenders and the invariable practice of railway companies to close the doors of compartments before a train was allowed to leave the station, but this they negligently failed to do on the occasion of this accident, and thereby an open door caused the injury to the pursuer:—

Held (reversing the judgment of the First Division of the Court of Session, (1908) S. C. 48), that there was a relevant averment of negligence by the defenders, inasmuch as facts were averred from which a jury might infer negligence; and that the pursuer was entitled to a trial by jury. TOAL *v.* NORTH BRITISH RAILWAY COMPANY - - - - **H. L. (Sc.) 352**

2. —— *Regulation — Provisional Order — Demurrage of Trucks — Arbitration — Right of Action for Damages for Detention—Jurisdiction —Great Western Railway Company (Rates and Charges) Order Confirmation Act*, 1891 (54 & 55 *Vict. c. ccxvii.*), *s.* 6.

A railway Act confirming a provisional order, after providing that when merchandise is conveyed in trucks not belonging to the company the trader shall be entitled to recover from the company a reasonable sum "by way of demurrage" for any detention of his trucks beyond a reasonable period, enacted that any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party:—

Held, that a claim by a trader for damages caused by undue detention of his truck and cost of hire of another in lieu thereof was a difference arising under that section, and could be determined only by an arbitrator appointed under the Act.

Decisions of the King's Bench Division, *Rex* v. *Marylebone County Court Judge and Great Western Ry. Co., Ex parte Phillips & Co.*, [1906] 2 K. B. 426, and of the Court of Appeal, [1907] 2 K. B. 664, reversed, and decision of the county court judge restored. GREAT WESTERN RAILWAY COMPANY *v.* PHILLIPS & CO., LD.
H. L. (E.) 101

—— Rates—"Land used only as a railway"—General district rate—Assessment **293**
See RATES. 1.

—— Street railway — Conditional power to remove snow from railed tracks—Implied obligation to remove snow from the streets—Law of Newfoundland. **520**
See PRIVY COUNCIL APPEALS. 33.

RATES — *Railway — General District Rate—Assessment—"Land used only as a Railway"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*)—*Light Railways Act*, 1896 (59 & 60 *Vict. c.* 48), *s.* 12, *sub-s.* 2.

A company were the owners of a light railway

RATES—*continued.*
constructed under an order made under the Light Railways Act, 1896. The railway, which physically resembled a tramway, was laid along certain open streets, and the order, while preserving to the public their ordinary right of passage over the highway, provided that the company should have the exclusive use of the railway for carriages with flange wheels. The company having been assessed to the general district rate in respect of their occupation of the railway :—

Held, upon the construction of s. 12, sub-s. 2, of the Light Railways Act, 1896, that s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, applied to light railways; and that, notwithstanding the user by the public of the surface of the streets in exercise of their right of passage, the company were occupiers of land used only as a railway constructed under the powers of an Act of Parliament for public conveyance within the meaning of s. 211, and were consequently entitled to be assessed to the general district rate in respect of the railway at one-fourth only of its net annual value.

Decision of the Court of Appeal, [1907] 2 K. B. 256, affirmed. WAKEFIELD CORPORATION *v.* WAKEFIELD AND DISTRICT LIGHT RAILWAY COMPANY - - - - - **H. L. (E.) 293**

2. —— *Sewage Farm let by Sewerage Board to Tenant—Poor Rate—Assessment.*

A sewage farm was let by the owners (the sewerage board) to a tenant :—

Held, that in assessing the tenant to the poor rate in respect of his occupation of the farm, the rating authority, when estimating the rent which a hypothetical tenant would be willing to pay, must take into consideration not merely the actual rent paid by the tenant, but the benefit accruing from the farm as a means of enabling the board to discharge their statutory duties; and that the board was not to be excluded from the list of possible hypothetical tenants.

Decision of the Court of Appeal, [1907] 1 K. B. 630, affirmed. DAVIES *v.* SEISDON UNION **H. L. (E.) 315**

REDEMPTION—Land Law (Ireland) Act—Redemption of liability for rent out of estate indemnified therefrom — Right over indemnifying lands - - **298**
See LANDLORD AND TENANT. 2.

REFUSE—Hotel — Removal of refuse — Trade refuse—Dispute between occupier and sanitary authority—Appeal by special case - - - - - - - **142**
See LONDON.

REGISTRATION — Conveyance void as unregistered—Limitation - - **60**
See PRIVY COUNCIL APPEALS. 11.

—— Prior registration of conveyance by defaulting owner—Actual purchase must be proved - - - - - - - **82**
See PRIVY COUNCIL APPEALS. 15.

—— Western Australian Transfer of Land Act, 1893—Wrongful registration—Measure of damages - - - - - - **235**
See PRIVY COUNCIL APPEALS. 6.

REMOTENESS—Damage, Measure of—Risk of future subsidence - - - **27**
See DAMAGE.

RENT—Land Law (Ireland) Act—Redemption of liability for rent out of estate indemnified therefrom—Right over indemnifying lands - - - **298**
See LANDLORD AND TENANT. 2.

RESERVOIR—Waterworks—Right of support from minerals under adjacent land **117**
See MINES.

RESIDUE—Administration bond—Duration of sureties' liability—Title of beneficiaries to the residue - - - - - **371**
See PRIVY COUNCIL APPEALS. 1.

—— Charity—Trust—Uncertainty—Will - **347**
See CHARITY. 2.

—— Executors—No next of kin—Residue undisposed of—Beneficial title of executors
See WILL. **411**

REVENUE—*Income Tax—Deductions for unexpired Risks—Fire Insurance Company.*

A company carrying on the business of fire, sickness, accident, and guarantee insurance (as distinguished from life insurance) is not entitled, in estimating the balance of its profits chargeable with income tax, to deduct or make any allowance for estimated risks unexpired at the end of the year.

Scottish Union and National Insurance Co. v. *Inland Revenue*, (1889) 16 R. 461, and *Imperial Fire Insurance Co.* v. *Wilson*, (1876) 35 L. T. 271, affirmed.

Decision of the First Division of the Court of Session, (1907) S. C. 1004, affirmed. GENERAL ACCIDENT, FIRE, AND LIFE ASSURANCE CORPORATION, LD. *v.* MCGOWAN - **H. L. (Sc.) 207**

2. —— *Stamp Duty—"Conveyance on Sale"—Matter or Thing to be done in the United Kingdom—Property in France—Conveyance executed in France—Consideration payable in England—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 1; *s.* 14, *sub-s.* 4; *s.* 54; *Sched. I.*

By a deed of "apport," executed in France, property in France was transferred by one English company to another English company, the consideration for the transfer being shares in the latter company which were to be issued, and delivered to the former company, in England. Stamp duty having been claimed as on a "conveyance on sale" in Sched. I. to the Stamp Act, 1891, on the ground that the instrument related to "a matter or thing to be done in the United Kingdom" within s. 14, sub-s. 4, of the Act :—

Held, that the instrument was a "conveyance on sale" within the meaning of the Act, and that it was liable to duty thereunder.

Decision of the Court of Appeal, [1906] 2 K. B. 834, reversed. INLAND REVENUE COMMISSIONERS *v.* MAPLE & CO. (PARIS), LD. **H. L. (E.) 22**

3. —— *Stamp Duty — Treasury Note of Foreign Government — Promissory Note or*

REVENUE—*continued.*

Marketable Security—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 33, 82, 122.

Where a document comes within each of two categories chargeable with duty under the Stamp Act, 1891, the Crown is entitled to only one of the duties, but it may choose the higher.

The United States of Mexico issued "gold coupon treasury notes" with a promise to pay principal and interest to bearer at fixed dates either abroad or, at the option of the holder, in London. There was evidence that the notes were saleable on the London and other Stock Exchanges :—

Held, that the notes being in fact both promissory notes and marketable securities within the Stamp Act, 1891, they were liable to the higher duty imposed by that Act upon marketable securities.

Decision of the Court of Appeal, [1907] 1 K. B. 246, affirmed. SPEYER BROTHERS *v.* INLAND REVENUE COMMISSIONERS **H. L. (E.) 92**

—— Income tax—New Zealand Land and Income Tax Assessment Act, 1900 - **46**
See PRIVY COUNCIL APPEALS. 32.

—— Ontario Succession Duty Act—Provincial taxation of property not within the province ultra vires - - - **508**
See PRIVY COUNCIL APPEALS. 12.

SALE—Contract of sale of land—Specific performance refused—Uncertainty as to consideration—Transvaal - - **520**
See PRIVY COUNCIL APPEALS. 33.

—— Sale of lands under Assessment Act, 1897—Notice in writing — Waiver — Law of Ontario - - - - - - **493**
See PRIVY COUNCIL APPEALS. 16.

SALE OF GOODS—*Ship—Passing of Property—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71) *ss.* 16, 18, 62—*Scottish Arrestment of Ship in course of Building.*

Where it appears to be the intention of the parties to a contract for the building of a ship that the vessel is not to be delivered and finally accepted until after an official trial off a foreign coast, and until after conditions of the contract have been fulfilled as to speed, consumption of coal, capacity, &c., the property in the ship does not pass to the purchaser while the vessel remains uncompleted, although the contract contains stipulations for the price to be paid by instalments at certain periods of construction.

The respondents, a Glasgow firm of shipbuilders, agreed to build two ships for an Italian firm, according to certain specifications and under the superintendence of an agent appointed by the Italian firm, for a certain amount payable by instalments at specified stages of construction; but delivery of the ships was not to be considered to be completed till they had passed trials at Greenock and off the Italian coast. Before the ships were fully constructed, but after several instalments had been paid, the appellants, an English firm of shipbuilders, arrested the ships in Scotland for a debt alleged to be due to them by the Italian company, but on a petition

SALE OF GOODS—*continued.*

to the First Division of the Court of Session the arrestments were recalled :—

Held (affirming the decision of the First Division), that no intention was shewn in the contract to make delivery of or to pass the property in the ships before they were completed, and that the arrestments were properly recalled. SIR JAMES LAING & SONS, LD. *v.* BARCLAY, CURLE & CO., LD. - - - **H. L. (Sc.) 35**

SCOTTISH LAW—Charity—Gift for relief of indigent bachelors and widowers—Uncertainty - - - - - - **162**
See CHARITY. 1.

—— Charity—Trust—Uncertainty—Residue
See CHARITY. 2. **347**

—— Election, Right of—Estates in Scotland and Australia—Two separate wills - **224**
See PRIVY COUNCIL APPEALS. 30.

—— Innkeeper—Liability of, for goods deposited "expressly for safe custody" - **357**
See INNKEEPER.

—— Insurance — Professional — Widows' fund limited to members of a society—Contributor expelled from society - **182**
See INSURANCE.

—— Landlord and tenant—Insanitary house—Negligence of landlord—Right of wife and children of tenant to claim damages for illness - - - - - - **176**
See LANDLORD AND TENANT. 1.

—— Railway company — Passenger — Damages for personal injuries—Failure of railway servants to close carriage doors before starting the train - - - - **352**
See RAILWAY. 1.

—— Sale of goods—Passing of property—Scottish arrestment of ship in course of building - - - - - - **35**
See SALE OF GOODS.

—— Sewers—Burgh sewers—Notice in writing to persons interested - - - **170**
See SEWERS. 1.

—— Trust — Gift of whole or annual income according to trustees' discretion — Assignation - - - - - - **342**
See TRUSTEE.

SERVANT—Master and.
See under EMPLOYER AND WORKMAN.

SETTING ASIDE—Award.
See under ARBITRATION.

—— Order granting new trial set aside—Verdict of jury upheld - - - - **260**
See PRIVY COUNCIL APPEALS. 13.

SETTLEMENT — *Estate Tail — Disentailing Assurance—Protector—Three Persons appointed by Settlor—Death of Two—Power to appoint new Protector—Power not exercised—Power of surviving Protector—Fines and Recoveries Act*, 1833 (3 & 4 *Will.* 4, *c.* 74), *ss.* 22, 32.

Three protectors of a settlement were

SETTLEMENT—*continued.*
appointed by the settlor under the Fines and Recoveries Act, 1833, with a provision for filling up vacancies. Two of the protectors died, and the vacancies were not filled up :—

Held that, since, upon the true construction of the settlement, it was not clear that the settlor intended to exclude survivorship, the surviving protector had power to exercise the office and to give a good title, the decision in *Bell* v. *Holtby*, (1873) L. R. 15 Eq. 178, having been followed for so many years.

Decision of the Court of Appeal, *In re Bayley-Worthington and Cohen's Contract*, [1908] 1 Ch. 26, affirmed. COHEN *v.* BAYLEY-WORTHINGTON - - - - - - - **H. L. (E.) 97**

—— Bankruptcy — Conveyance by settlor to himself as trustee—Straits Settlements Bankruptcy Ordinance of 1888—Construction—Voluntary settlement - **402**
See PRIVY COUNCIL APPEALS. 34.

SETTLEMENT (POOR LAW).
See under POOR LAW.

SEWAGE FARM—Let by sewerage board to tenant—Poor rate—Assessment - **315**
See RATES. 2.

SEWERS—*Notice—Local Government—Burgh Sewers—Notice in Writing to Persons interested—Public Health (Scotland) Act*, 1897 (60 & 61 *Vict. c.* 38), *s.* 103—*Burgh Police (Scotland) Act*, 1892 (55 & 56 *Vict. c.* 55), *s.* 217—*Burgh Sewerage, Drainage and Water Supply (Scotland) Act*, 1901 (1 *Edw.* 7, *c.* 24), *s.* 5.

By the Burgh Sewerage, Drainage and Water Supply (Scotland) Act, 1901, s. 5, "The powers and duties of the town council of any burgh, as the authority under the principal Act" (the Burgh Police Act of 1892), "with reference to sewerage and drainage and water supply shall extend to the whole area of the burgh as existing for the purposes of the Public Health (Scotland) Act, 1897, and the town council of any burgh as the authority under the principal Act, in addition to the powers conferred upon them by the principal Act or any other Act, shall with reference to sewerage and drainage or water supply within such area have the same rights, powers and privileges as are conferred by the Public Health (Scotland) Act, 1897, upon local authorities under that Act in districts other than burghs . . . . and in so far as necessary for giving effect to this enactment the last-mentioned Act and the Acts and parts of Acts incorporated therewith are subject to the necessary modifications incorporated with the principal Act." By s. 217 of the Burgh Police (Scotland) Act, 1892, nothing in the Act "shall be construed to authorize the commissioners contrary to any private right to use, injure, or interfere with any sewers . . . . or interfere with any water course . . . . in which the owner or occupier of any lands, mills . . . . shall have right or interest, without the consent in writing of the person legally entitled to grant the same." By s. 103 of the Public Health (Scotland) Act, 1897, "The local authority shall have power to construct . . . . such sewers as they may think necessary . . . . and may

SEWERS—*continued.*
carry such sewers . . . . after reasonable notice in writing (if upon the report of a surveyor it should appear to be necessary) into, through, or under any lands whatsoever."

A local authority having laid sewer pipes upon the surface of the bed of a stream, certain proprietors entitled to notice, who considered that they were prejudiced by the pipes being on the surface instead of under the surface, raised an action in which they demanded the removal of the pipes, on the ground (inter alia) that the notice required by s. 217 of the Act of 1892 had not been given :—

Held (affirming the decision of the Court of Session, (1908) S. C. 127), that, under the Act of 1901, a burgh, in the construction of sewers, can proceed either under the Act of 1892 or the Act of 1897, and that, the local authority having decided to proceed under the Act of 1897, they were not bound to obtain the consent of the proprietors as required by the Act of 1892. MONTGOMERIE & CO. *v.* PROVOST AND MAGISTRATES OF HADDINGTON - **H. L. (Sc.) 170**

2. —— "*Sewer*"—"*Single private Drain*"—*Pipe receiving Drainage from Sewer—Connection with public Sewer—Local Government—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.

Several houses of different owners stood in a row and were drained in pairs; each house of each pair was drained by a separate pipe into a pipe common to both houses, and each of these common pipes discharged into a line of pipes laid in private ground which discharged into a public sewer. The "common pipes" were admittedly "sewers" within the Public Health Act, 1875 :—

Held, that the "line of pipes" which discharged into the public sewer was not "a single private drain" within the meaning of s. 19 of the Public Health Acts Amendment Act, 1890, and therefore that proceedings could not be taken under that section and s. 41 of the Public Health Act, 1875.

Decision of the Court of Appeal, [1907] 1 K. B. 182, affirmed on the above ground, and not upon the ground upon which that Court decided. WOOD GREEN URBAN COUNCIL *v.* JOSEPH **H. L. (E.) 419**

SHIPPING—*Average, General—Cargo of Coal—*—"*Inherent Vice*"—*Spontaneous Combustion—Liability of Ship to contribute to General Average—York-Antwerp Rules*, 1890, *r.* 3—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 502.

Coal shipped without negligence on the part of any one took fire by spontaneous combustion, and the water used in extinguishing the fire damaged the whole cargo of coal :—

Held, that by maritime law the owners of the coal were entitled to claim against the ship contribution in general average in respect of the sacrifices voluntarily made for the common advantage of all, the fire having been caused by the inherent qualities of the coal, or, in other words, by spontaneous combustion, without default on the part of the shippers;

Held, also, that this principle was not affected

by the York-Antwerp Rules which were incorporated in the bills of lading;

Held, also, that the Merchant Shipping Act, 1894, s. 502, afforded no defence to the claim.

Decision of the Court of Appeal, [1908] 1 K. B. 51, affirmed. GREENSHIELDS, COWIE & CO. *v.* STEPHENS & SONS, LD. **H. L. (E.) 431**

2. —— *Bill of Lading—Construction—"Inaccessible on account of Ice"—"Unsafe in consequence of War, Disturbance or any other Cause"—Ejusdem Generis Principle.*

Goods were shipped on board a steamship for a foreign port under bills of lading providing that if a port should be inaccessible on account of ice, blockade or interdict, or if entry and discharge at a port should be deemed by the master unsafe in consequence of war, disturbance or any other cause, it should be competent for the master to discharge the goods on the ice or at some other safe port or place:—

Held that, upon the true construction of the bills of lading, "inaccessible" and "unsafe" must be read reasonably and with a view to all the circumstances; that the words "or any other cause" must be read as being ejusdem generis with war or disturbance; and that as a matter of fact the master was not justified under all the circumstances in this case in failing to deliver the goods at the port for which they were shipped merely because that port was at the moment of their arrival inaccessible on account of ice for three days only.

Decision of the Court of Appeal, [1908] 2 K. B. 385, affirmed. SS. KNUTSFORD, LD. *v.* TILLMANNS & CO. - - - **H. L. (E.) 406**

3. —— *Charterparty — Exceptions—Demurrage—Construction—"Or Hindrances of what Kind soever"—"Ejusdem generis."*

By a charterparty the parties exempted each other from all liabilities arising from "frosts floods strikes . . . . and any other unavoidable accidents or hindrances of what kind soever beyond their control delaying the loading of the cargo":—

Held that, upon the natural and true construction of the clause, the parties, by inserting the words "of what kind soever," intended to exclude the doctrine or rule of ejusdem generis, and that the charterers were not liable for delay in loading caused by a block of other ships at the loading port. LARSEN *v.* SYLVESTER & CO. **H. L. (E.) 295**

4.—— *Charterparty—Lay Days—Exception of Sundays and Holidays — Loading done on Holidays by Mutual Consent—Despatch Money—Days saved in Loading.*

By a charterparty, "Seven weather working days (Sundays and holidays excepted)" were "to be allowed by shipowners to charterers for loading," and for any time beyond that period the charterers were to pay demurrage at the rate of 40*l.* per day, and "for each clear day saved in loading the charterers" were to "be paid or allowed by the owners the sum of 20*l.*" The loading of a ship under this charterparty was continued during holidays. No evidence was given of any agreement in fact varying the terms of the charterparty and providing that the holidays in question should count as lay days:—

Held, that no inference of law could be drawn so varying the terms, and that the charterers, having loaded in days less than the lay days, were entitled to despatch money (20*l.* per day) for days "saved in loading."

Decision of the Court of Appeal, [1907] 2 K. B. 705, reversed. JAMES NELSON & SONS, LD. *v.* NELSON LINE (LIVERPOOL), LD. **H. L. (E.) 108**

5. —— *Collision—Limitation of Liability—"Owners"—Charterer by Demise—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504—*Merchant Shipping Act*, 1906 (6 *Edw.* 7, *c.* 48), *s.* 71.

The charterer of a ship by demise who has control over her and navigates her by his own master and crew is "owner" of the ship within ss. 503 and 504 of the Merchant Shipping Act, 1894, and entitled to the limitation of liability to damages conferred upon "owners" by those sections.

Decisions of Bargrave Deane J., *The Hopper No.* 66, [1906] P. 34, and of the Court of Appeal, [1907] P. 254, reversed. SIR JOHN JACKSON, LD. *v.* OWNERS OF STEAMSHIP "BLANCHE." THE HOPPER NO. 66 - - **H. L. (E.) 126**

6. —— *Collision — Thames By-laws*, 1898, *art.* 46—*Risk of Collision.*

Two steam vessels proceeding in opposite directions the one up and the other down the river Thames, came into collision:—

Held, as a question of pure fact upon the evidence, that the vessel proceeding down the river was alone in fault.

Decision of the Court of Appeal, *The Guildhall*, [1908] P. 29, reversed and decision of Bucknill J. restored. OWNERS OF SS. GUILDHALL *v.* GENERAL STEAM NAVIGATION COMPANY. THE GUILDHALL - - - - **H. L. (E.) 159**

7. —— *Contract of Carriage—Construction—Liability of Shipowner — Unseaworthiness — Exceptions—"Damage capable of being covered or which has been paid for by Insurance."*

A shipowner agreed to carry frozen meat by an agreement which was so ill thought out and ill expressed in self-contradictory sentences that it was impossible to feel sure what the parties intended to stipulate. Frozen meat shipped under this agreement arrived damaged owing to the unseaworthiness of the ship and the negligence of the shipowner's agents:—

Held that, there being no clear and express exemption, the shipowner was not relieved from his duty to provide a seaworthy ship and to take reasonable care.

Decision of the Court of Appeal, [1907] 1 K. B. 769, affirmed on the above ground. NELSON LINE (LIVERPOOL), LD. *v.* JAMES NELSON AND SONS, LD. - - - - **H. L. (E.) 16**

—— Collision in dense fog—Negligence in not going with moderate speed - - **251**
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SHIPPING—*continued.*

—— Collision at Sea (Regulations for Preventing), 1894, art. 16 - - - **251**
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—— Demurrage, Construction as to clause for—Contract for sale and delivery of coal by shipments—Indemnity—Novation **276**
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—— Sale of goods—Scottish arrestment of ship in course of building - - - **35**
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SINGAPORE, SETTLEMENT OF—Straits Settlements—Laws of - - - - **402**
See PRIVY COUNCIL APPEALS. 34.

SNOW—Street railway—Conditional power to remove snow from railed tracks—Implied obligation to remove snow from the streets—Law of Newfoundland **520**
See PRIVY COUNCIL APPEALS. 33.

SOLICITOR — *Costs — Taxation — Agreement by Third Party to pay Costs—Question as to Construction of Agreement—Jurisdiction of Master—Payment of Bill—"Special Circumstances"—Practice—Solicitors Act,* 1843 (*6 & 7 Vict. c.* 73), *s.* 38.

The parties to an action agreed to a compromise upon the terms that the defendants should pay the costs of all parties as between solicitor and client in relation to the plaintiff's claims against the defendants. The plaintiff paid her solicitors their bill of costs and claimed the amount from the defendants, who then took out a summons for a reference to the taxing Master to tax the plaintiff's costs in accordance with the agreement of compromise. The plaintiff's solicitors opposed the application on the grounds that the bill had been paid and that questions would arise on the construction of the agreement which ought to be decided in an action and not by the taxing Master :—

Held, that under the circumstances an order for a reference was justified by s. 38 of the Solicitors Act, 1843.

Decision of the Court of Appeal, reported as *In re Hirst & Capes*, [1908] 1 K. B. 982, affirmed with a slight variation. HIRST & CAPES *v.* FOX . - - - - **H. L. (E.) 416**

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10 & 11 Vict. c. 17, ss. 18–27—*Waterworks Clauses* - - - - - **117**
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TRUSTEE — *Trust—Gift of whole or Annual Income according to Trustees' Discretion — Assignation.*

A testator died in 1899 having by a trust disposition and settlement directed his trustees to set aside and invest in their own names, as trustees, the sum of 5000*l.* and pay to his brother during his lifetime "either the whole or only a portion of the annual revenue thereof, and that subject to such conditions and restrictions all as my trustees in their sole and absolute discretion think fit."

The trustees paid to the brother 24*l.* 5*s.* only out of the income during five years. The trust was a difficult one to administer, the principal asset being the goodwill and stock-in-trade of a public-house which the trustees were only able to sell in 1901. It realized much less than was anticipated. They then became involved in litigation with other legatees, and finally an action was brought by the assignee of the brother's interest under the settlement claiming the whole free income then available of the 5000*l.* :—

Held (affirming the decision of the First Division of the Court of Session, (1907) S. C. 517), that the assignee had no higher right than the brother, and that he had no right to the total income in question, its disposal being left absolutely to the discretion of the trustees. TRAIN *v.* CLAPPERTON - - - **H. L. (Sc.) 342**

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WILL—*Executors—No Next of Kin—Residue undisposed of—Beneficial Title of Executors—Equal pecuniary Legacies to all — Unequal specific Legacies to some—Presumption of Intention—Will—Construction.*

The rule established by the old law as to executors being trustees of undisposed of residue must not be extended beyond the cases which established it.

By a will in 1881 (to which the Executors Act, 1830, did not apply) the testator appointed three executors, and gave to each an equal pecuniary legacy and to two of them specific legacies of unequal value. There being no gift of residue and no next of kin, the Crown claimed the residuary estate :—

Held that, on the true construction of this will, the peculiar circumstances raised no presumption that the testator intended to make the executors merely trustees, and that they were entitled to the residuary estate for their own benefit.

Decision of the Court of Appeal, reported as *In re Glukman, Attorney-General* v. *Jefferys*, [1908] 1 Ch. 552, affirmed. ATTORNEY-GENERAL *v.* JEFFERYS - - - - **H. L. (E.) 411**

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